No.

IN THE

Supreme Court of the United States

MARC S. KIRSCHNER, solely in his capacity as Trustee of the Millennium Lender Claim Trust,

Petitioner,

v.

JP MORGAN CHASE BANK, N.A., JP MORGAN SECURITIES LLC, CITIBANK, N.A., BANK OF MONTREAL, BMO CAPITAL MARKETS CORP., SUNTRUST ROBINSON HUMPHREY, INC., SUNTRUST BANK, CITIGROUP GLOBAL MARKETS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The securities laws define "security" to include "any note." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). In *Reves* v. *Ernst & Young*, 494 U.S. 56 (1990), this Court held that that definition "should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish." *Id.* at 63. *Reves* directs courts to "presum[e] that every note is a security," but the presumption may be overcome if a note bears a "strong resemblance" to a category of notes traditionally considered not to be securities. *Id.* at 65-67.

This case concerns whether syndicated loan notes are "securities." Syndicated loans are a $3 trillion industry. In a syndicated loan, a bank provides a massive loan to a company and then "syndicates" the notes to hundreds of mutual funds, pension funds, and other investors. Those notes bear no resemblance to traditional commercial bank loans. They trade on secondary markets with standardized terms and CUSIP numbers, just like stocks and bonds. They are widely acknowledged to function as a substitute for high-yield "junk" bonds. The Second Circuit nonetheless held that, under *Reves*, the notes were not securities. The questions presented are:

1. Whether notes issued as part of a syndicated loan are "securities" under the securities laws.

2. Whether the Court should revisit the *Reves* standard and replace it with one better grounded in the statutory text.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States Court of Appeals (2d Cir.):

- *Kirschner* v. *JP Morgan Chase Bank, N.A.*, No. 21-2726 (judgment entered Aug. 24, 2023)

United States District Court (S.D.N.Y.):

- *Kirschner* v. *JP Morgan Chase Bank, N.A.*, No. 17 Civ. 6334 (final order entered Sept. 30, 2021)

Supreme Court of the State of New York:

- *Kirschner* v. *JP Morgan Chase Bank, N.A.*, No. 655124/2017 (notice of removal filed Aug. 21, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Marc S. Kirschner, solely in his capacity as Trustee of the Millennium Lender Claim Trust, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

PRELIMINARY STATEMENT

This case concerns a question fundamental to the authority of federal and state securities regulators—what constitutes a "security." The securities laws expressly define "security" to include "any note." 15 U.S.C.

§§ 77b(a)(1), 78c(a)(10). In *Reves* v. *Ernst & Young*, 494 U.S. 56 (1990), however, this Court held that "the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish." *Id.* at 63. *Reves* directs courts to "presum[e] that every note is a security," but the presumption may be overcome if a note bears a "strong resemblance" to a category traditionally considered *not* to be securities. *Id.* at 65-67.

The decision below invoked *Reves* to hold that notes that look like securities, are traded like securities, and carry the same risks as securities, are not securities. The case involves "syndicated loans." Syndicated loans bear no resemblance to traditional bank loans. Instead, a bank extends a massive loan to a company and then "syndicates" the notes to *hundreds* of investors. The notes then trade on secondary markets using standardized terms, just like stocks or bonds.

In this case, JP Morgan and other banks arranged a $1.775 billion loan to Millennium Health LLC and then syndicated the notes to over 400 mutual funds, hedge funds, pension funds, and other investors. Millennium used the proceeds to pay off its existing debts to the banks and to pay a $1.27 billion extraordinary dividend to shareholders. The notes promptly began trading on secondary markets.

The offering documents the banks used to market the notes concealed major legal risks. Millennium's management suggested disclosing them, but the banks refused on the ground that the offering materials were "not [an] SEC document." C.A. App. 40-41 ¶¶ 72-75. Soon after, the company paid a massive settlement to the Department of Justice and declared bankruptcy. Investors were left without a remedy when the district court held that

the notes were not securities. The Second Circuit affirmed, interpreting *Reves* to call for an open-ended balancing test that exempts essentially all syndicated loan notes from the securities laws.

The Second Circuit's decision presents an issue of profound importance to both regulators and investors. Syndicated loan notes are distributed to large and diffuse groups of investors. They trade on active secondary markets, with price quotations, CUSIP numbers, and high-yield analysts providing market research. They now function as a substitute for high-yield "junk" bonds—instruments that everyone agrees are securities.

Syndicated loans are now a $3 *trillion* market. Yet investors have no meaningful opportunity to conduct due diligence, and nearly all the loans are "covenant-lite," depriving investors of even modest protections. A quarter of the market is held by mutual funds and pension funds, so even retail investors and retirees are at risk.

The Securities and Exchange Commission has repeatedly warned about the dangers of excluding loan products from the securities laws. In this very case, the Second Circuit asked the SEC for its views. The SEC reportedly concluded that syndicated loans are securities, but declined to file a brief following intense industry lobbying and diverging views from other regulators.

Soon after, SEC Commissioner Caroline Crenshaw highlighted the risks of these "'loans' that look less and less like loans":

> [T]he loans themselves are far different from traditional loans. Many are sold to hundreds of "passive" investors. They trade frequently and on standardized documentation. And they are used to

> conduct activities far beyond traditional borrowing to buy a piece of machinery or a new building.
>
> Despite this significant growth, much of this market is not subject to meaningful regulation and investors are being put at risk. In addition, I am concerned that systemic financial issues are lurking in the market, and that * * * the risk to the financial system itself will continue to grow.

Caroline A. Crenshaw, *In-Securities: What Happens When Investors in an Important Market Are Not Protected? Remarks to the Center for American Progress* (Oct. 11, 2023), https://www.sec.gov/news/speech/crenshaw-remarks-center-american-progress-101123.

These issues warrant the Court's review. Loans that are divided up into hundreds of notes and then traded on secondary markets, just like high-yield bonds, are "securities" under any reasonable definition. The Second Circuit's contrary holding converts *Reves* into an invitation for subjective judicial balancing. *Reves* now operates as a license to exempt investments from the reach of securities regulators based not on what the statute says, but on a court's own evaluation of whether the instruments *should* be regulated. That is not what *Reves* prescribes.

If *Reves* can be read so capaciously as to support the Second Circuit's approach, the Court should reconsider the decision. *Reves*'s philosophy—that courts should ignore the literal terms of a statute and speculate about "what Congress was attempting to accomplish," 494 U.S. at 63—defies basic principles of statutory construction. It denies the securities laws the broad coverage Congress directed. Syndicated loan notes are "securities" under the definitions Congress adopted, and courts should enforce those laws as written.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-34a) is reported at 79 F.4th 290. The court of appeals' accompanying summary order (App., *infra*, 35a-39a) is unreported but available at 2023 WL 5439495. The district court's opinion and order granting respondents' motion to dismiss (App., *infra*, 40a-79a) is unreported but available at 2020 WL 2614765.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on August 24, 2023. C.A. Dkt. 225. On November 15, 2023, Justice Sotomayor extended the time to file this petition until December 19, 2023. No. 23A431. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title 15 of the U.S. Code are set forth in the appendix. App., *infra*, 80a-94a.

STATEMENT

I. STATUTORY FRAMEWORK

Congress enacted the securities laws after "rampant abuses in the securities industry led to the 1929 stock market crash and the Great Depression." *Kokesh* v. *SEC*, 581 U.S. 455, 457 (2017). Congress's "basic purpose" was "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *Lorenzo* v. *SEC*, 139 S. Ct. 1094, 1103 (2019).

A. The Securities Laws' Scope

In enacting the securities laws, Congress sought "to regulate *investments*, in whatever form they are made and by whatever name they are called." *Reves* v. *Ernst & Young*, 494 U.S. 56, 60-61 (1990). Consistent with that objective, Congress adopted an expansive definition of "security." The Securities Act of 1933 defines "security"

to include a long list of instruments, including "*any note*, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement," among others. Ch. 38, §2(1), 48 Stat. 74, 74 (1933) (codified as amended at 15 U.S.C. §77b(a)(1)). The Securities Exchange Act of 1934 contains a similar definition. Ch. 404, §3(a)(10), 48 Stat. 881, 882-884 (1934) (codified as amended at 15 U.S.C. §78c(a)(10)).

Congress borrowed those definitions from the Uniform Sale of Securities Act, a model law that tracked the expansive state "blue sky" laws of the era. See *Federal Securities Act: Hearing on H.R. 4314 Before the H. Comm. on Interstate & Foreign Commerce*, 73d Cong. 13 (1933) ("*House Hearing*"); *Securities Act: Hearings on S. 875 Before the S. Comm. on Banking & Currency*, 73d Cong. 324 (1933). Congress "painted with a broad brush * * * to encompass virtually any instrument that might be sold as an investment." *Reves*, 494 U.S. at 60-61.

Congress carefully carved out limited exceptions where it considered them appropriate. After legislators expressed concerns about regulating short-term commercial paper, *House Hearing* 179-183, Congress exempted "[a]ny note, draft, bill of exchange, or banker's acceptance * * * which has a maturity at the time of issuance of not exceeding nine months," ch. 38, §3(a)(3), 48 Stat. at 76 (codified as amended at 15 U.S.C. §77c(a)(3)); ch. 404, §3(a)(10), 48 Stat. at 884 (codified as amended at 15 U.S.C. §78c(a)(10)). Under the Securities Act, that exemption extends only to registration requirements, not antifraud provisions. Ch. 38, §§12(2), 17(c), 48 Stat. at 84-85 (codified as amended at 15 U.S.C. §§77*l*(a)(2), 77q(c)). Congress thus "carefully exempt[ed] * * * certain types of securities and securities transactions where there [wa]s no practical need" for a par-

ticular type of regulation, but otherwise left the statutes' broad coverage intact. H.R. Rep. No. 73-85, at 5 (1933).

B. The *Reves* Test

Although the securities laws define "security" to include "any note," courts have long opined that Congress could not have intended to regulate all "notes," such as the note in a traditional home mortgage loan. Courts, however, have struggled with where to draw that line.

Some circuits applied an "investment vs. commercial" test. See, *e.g.*, *Futura Dev. Corp.* v. *Centex Corp.*, 761 F.2d 33, 40-41 (1st Cir. 1985), cert. denied, 474 U.S. 850 (1985). Others applied a "risk capital" test. See, *e.g.*, *Great W. Bank & Tr.* v. *Kotz*, 532 F.2d 1252, 1256-1260 (9th Cir. 1976). Others applied the "investment contracts" test from *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946). See, *e.g.*, *Arthur Young & Co.* v. *Reves*, 856 F.2d 52, 54 (8th Cir. 1988), rev'd, 494 U.S. 56 (1990).

In *Exchange National Bank of Chicago* v. *Touche Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976), cert. denied, 469 U.S. 884 (1984), the Second Circuit adopted a "family resemblance" test. *Id.* at 1137-1138. That test began with a presumption that all notes are securities. *Ibid.* A party could overcome that presumption by showing that the note at issue bore a "strong family resemblance" to a category traditionally thought *not* to be securities, such as "the note delivered in consumer financing" or "the note secured by a mortgage on a home." *Id.* at 1138. The court later added "loans by commercial banks for current operations" to that list. *Chem. Bank* v. *Arthur Andersen & Co.*, 726 F.2d 930, 939 (2d Cir. 1984), cert. denied, 469 U.S. 884 (1984).

In *Reves* v. *Ernst & Young*, 494 U.S. 56 (1990), this Court adopted a modified version of that test. The Court held that "the phrase 'any note' should not be interpreted

to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish." *Id.* at 63. Nonetheless, "because the [statutes] define 'security' to include 'any note,' [courts must] begin with a presumption that every note is a security." *Id.* at 65.

The Court agreed that the Second Circuit's list of excluded families were "not properly viewed as 'securities.'" 494 U.S. at 65. But it did not stop there. Pronouncing that "[m]ore guidance * * * is needed," the Court identified four factors to consider in deciding whether a note sufficiently resembles an exempt family—or whether to add a new family to the list: (1) "the motivations that would prompt a reasonable seller and buyer" to enter into the transaction; (2) the "plan of distribution"; (3) the "reasonable expectations of the investing public"; and (4) "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument." *Id.* at 66-67.

II. Proceedings Below

This case arises out of $1.775 billion in syndicated loan notes that Millennium Health LLC issued to investors. App., *infra*, 4a-6a. Petitioner Marc Kirschner is the Trustee for investors who purchased the notes. *Id.* at 13a. Respondents are the banks that arranged the syndication. *Id.* at 5a-6a.

A. Millennium's Syndicated Loan

Millennium was a drug-testing company based in California. App., *infra*, 4a. In 2012, the respondent banks extended a $330 million credit facility to the company. *Id.* at 4a-5a. But when the government began investigating legal violations, respondents sought to eliminate their exposure. *Id.* at 5a.

Respondents' solution was a "huge institutional financing" through which Millennium issued $1.775 billion in syndicated loan notes. App., *infra*, 5a-6a. Respondents distributed the notes to over 400 mutual funds, hedge funds, pension funds, and other institutional investors. *Id.* at 6a, 26a-27a n.94, 41a, 56a. The notes were "covenant-lite," lacking the protections of typical bank loans. C.A. App. 31-32 ¶¶46-50.

The notes were subject to modest restrictions on resale. They could not be sold to natural persons; for the most part they could be sold only in blocks of $1 million or more; and Millennium and JP Morgan had to consent to any transfer, although Millennium was deemed to have consented if it did not object within five days. App., *infra*, 11a, 25a n.90. The notes began trading on secondary markets as soon as the transaction closed. *Id.* at 12a. JP Morgan assigned a "High Yield Research" analyst to monitor secondary market activity and disseminate information to investors. *Id.* at 12a n.35.

Millennium did not use any of the $1.775 billion in proceeds to fund its current commercial operations. It used $1.27 billion to pay a dividend to shareholders; $304 million to pay off its existing credit facility with respondents; $196 million to redeem other securities; and $45 million to pay fees and expenses. App., *infra*, 6a.

B. District Court Proceedings

A year later, Millennium announced a $256 million settlement with the Department of Justice. App, *infra*, 12a-13a. Soon after, it declared bankruptcy. *Id.* at 13a. Petitioner was appointed Trustee to pursue claims for the investors. *Id.* at 13a.

In August 2017, petitioner sued respondents in state court. App., *infra*, 13a. He asserted securities claims

under the blue sky laws of California, Colorado, Illinois, and Massachusetts. *Id.* at 49a. The complaint alleged that respondents' offering materials contained material misrepresentations and omissions. *Id.* at 49a-50a. The concealed information included legal risks that Millennium's management had proposed disclosing, but which respondents refused to include on the ground that the offering materials were "not [an] SEC document." C.A. App. 40-41 ¶¶ 72-75.

After removing the case to federal court, respondents moved to dismiss on the ground that syndicated loans were not securities. App., *infra*, 51a-53a. The district court agreed with the Trustee that all the relevant state laws followed *Reves*. *Id.* at 53a. Applying *Reves*, however, it held that syndicated loans were not securities and dismissed. *Id.* at 54a-63a.

C. The Court of Appeals' Decision

The court of appeals affirmed. App., *infra*, 1a-34a.

1. Following oral argument, the court of appeals invited the SEC to express its views on "whether the syndicated term loan notes at issue in this appeal are securities." C.A. Dkt. 170. The SEC obtained several extensions of time. App., *infra*, 32a n.117. But it ultimately filed a letter stating that, "[d]espite diligent efforts to respond to the Court's order and provide the Commission's views, the staff is unfortunately not in a position to file a brief." C.A. Dkt. 207.

According to news reports, the SEC was prepared to file a brief urging that syndicated loans are securities. See Liz Hoffman, *What's a Security? For Once, the SEC Won't Say*, Semafor, July 25, 2023 (reporting that SEC's brief "would have required bank loans to carry the same kind of disclosures as stocks and bonds"). But the agency

reportedly backed down following industry lobbying and resistance from banking regulators. See Michelle Celarier, *Are Leveraged Loans Securities? The Answer Could Upend a Trillion Dollar Market*, Institutional Investor, July 17, 2023 (reporting that "banks have been busy making their case to the SEC"); Hoffman, *supra* (SEC "backed down last week under quiet pressure from the Federal Reserve and U.S. Treasury"); C.A. Dkt. 213-1 Exs. A-E (additional reports).

2. Following the SEC's refusal to file a brief, the court of appeals affirmed. The court accepted the Trustee's position that all the relevant state laws followed the federal standard this Court established in *Reves*. App., *infra*, 19a n.58. But it held that syndicated loan notes were not securities under that standard. *Id.* at 18a-33a.

The court's analysis tracked the four *Reves* factors. App., *infra*, 18a-33a. But rather than inquire whether each factor suggested a resemblance to a particular exempt category of notes, the court treated the four factors as an open-ended balancing test for whether syndicated loans *should* be regulated as "securities." *Ibid.*

The court stated that the first *Reves* factor, the motivations of the parties, favored treating the notes as securities. App., *infra*, 22a-24a. The purchasers had "investment" motives because they "expected to profit from their purchase of the Notes." *Id.* at 23a. The court asserted, however, that Millennium had "commercial" motives because it used the proceeds primarily to pay a dividend and pay off its credit facility. *Id.* at 23a-24a. The court did not explain why those motives were "commercial" or how they distinguish Millennium from any company raising money by selling stocks or bonds.

The court held that the second factor, the plan of distribution, weighed against treating the notes as securities. App., *infra*, 24a-27a. It urged that the banks distributed the notes only to "sophisticated institutional entities," not "the general investing public." *Id.* at 24a-25a. It acknowledged that the notes were distributed to over 400 initial investors and then traded on secondary markets. *Id.* at 25a-27a & n.94. In its view, however, those circumstances were not a distribution to the "general public" because the notes were subject to modest transfer restrictions. *Id.* at 25a & n.90.

The court held that the third factor, the reasonable expectations of the public, weighed against treating the notes as securities. App., *infra*, 27a-29a. The court acknowledged that the offering documents referred to purchasers as "investors." *Id.* at 28a. The offering memorandum referred to "Public Side Investors," and other documents referred to a "[p]ublic investors dial-in" and an "[i]nvestor presentation." *Id.* at 7a & n.14. But the court deemed those references inconclusive because "the loan documents more consistently refer to the buyers as 'lenders.'" *Id.* at 29a.

Finally, the court held that the fourth factor, risk-reducing factors, weighed against treating the notes as securities. App., *infra*, 29a-32a. The notes were secured by Millennium's assets. *Id.* at 30a. And bank regulators had issued "specific policy guidelines" on syndicated loans. *Id.* at 30a-31a.

The court of appeals concluded its analysis with a single sentence comparing syndicated loan notes to traditional bank loans. It held that "the Notes * * * 'bear[] a strong resemblance' to one of the enumerated categories of notes that are not securities: '[L]oans issued by

banks for commercial purposes.'" App., *infra*, 33a. The court accordingly affirmed. *Id.* at 33a-34a.

REASONS FOR GRANTING THE PETITION

Invoking *Reves* v. *Ernst & Young*, 494 U.S. 56 (1990), the decision below held that syndicated loan notes are not "securities." That decision puts those instruments beyond the reach of both securities regulators and the securities laws. That result cannot be reconciled with this Court's precedents or the statutory text.

The securities laws expressly extend to "any note." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). Syndicated loan notes are undeniably "notes." Moreover, they look like, act like, and are designed to function like securities—not ordinary bank loans. They are issued to hundreds of investors that include mutual funds, pension funds, and other investment vehicles. They trade on secondary markets pursuant to standardized terms. They even have their own CUSIP numbers to facilitate trading. And because investors typically have no meaningful relationship with the issuer, the notes pose all the risks the securities laws are designed to address.

Whether syndicated loans are securities is an issue of profound importance. This multi-trillion-dollar industry now lies beyond the reach of securities regulators. As SEC Commissioner Crenshaw warned, "much of this market is not subject to meaningful regulation and investors are being put at risk." Crenshaw, *supra*. "[T]he risk to the financial system itself will continue to grow." *Ibid.* This case perfectly illustrates those risks: Respondents concealed serious legal risks when they marketed syndicated loan notes to unsuspecting investors, who have now been left without a remedy.

This case's importance extends well beyond syndicated loans. *Reves* held that the statutory definition, which expressly covers "any note," "should not be interpreted * * * literally" but instead should track a court's own assessment of "what Congress was attempting to accomplish." 494 U.S. at 63. If *Reves* authorizes the open-ended balancing the court engaged in below, this Court should reconsider that decision and replace it with a test more faithful to the statutory text.

I. Whether Syndicated Loans Are Beyond The Reach Of The Securities Laws Is An Issue Of Critical Importance

The Second Circuit's decision places an enormous and growing market beyond the reach of securities regulators. It threatens serious harm to investors. And it imperils other markets as well.

A. Syndicated Loans Have All the Essential Attributes of Securities

1. Syndicated loans represent a fundamental shift in corporate finance that threatens to put a vast range of risky debt instruments beyond the reach of the securities laws. While corporate banking once followed an "originate-and-hold" model, it has now shifted to an "originate-to-distribute" model. See Elisabeth de Fontenay, *Do the Securities Laws Matter? The Rise of the Leveraged Loan Market*, 39 J. Corp. L. 725, 739 (2014). Under that new model, "the lead arranger negotiates the key terms of the loan with the borrowing company, and then organizes a syndicate of lenders to fund it." *Id.* at 740.

Syndicated loan notes are worlds away from traditional bank loans. Unlike traditional loans, they are distributed to a large and diffuse group of investors. "Many are sold to hundreds of 'passive' investors." Crenshaw, *supra*; *e.g.*,

In re Motors Liquidation Co., 555 B.R. 355, 358 (Bankr. S.D.N.Y. 2016) ("more than 400 lenders"), aff'd, No. 09-50026, 2017 WL 3491970 (S.D.N.Y. Aug. 14, 2017). This case involved over 400 initial investors. App., *infra*, 26a-27a n.94.

Syndicated loan investors are not traditional commercial lending banks. Rather, 62% of syndicated loans are held by investment vehicles known as collateralized loan obligations ("CLOs"), 20% are held by mutual funds, 6% by insurance companies, and 5% by pension funds and other entities. Eva Su *et al.*, Cong. Rsch. Serv., R46096, *Leveraged Lending and Collateralized Loan Obligations* 5-6 & fig. 2 (Dec. 4, 2019). Only 8% are held by banks. *Ibid.* The corporate debt market has thus "shifted from a bank-led market to an institutional investor-led market comprised of finance and insurance companies, hedge, high-yield and distressed funds, loan mutual funds, and structured vehicles." Bridget Marsh & Tess Virmani, *Loan Syndications and Trading*, in *Lending & Secured Finance* 1, 2 (11th ed. 2023).

2. Syndicated loan notes trade on active secondary markets. See Gary D. Chamblee & Jolie Amie Tenholder, *Converging Markets: Leveraged Syndicated Loans and High-Yield Bonds*, Com. Lending Rev., Nov.-Dec. 2005, at 7, 14. Several factors spurred those markets, including "the development of a network of trading desks for these [loans], the availability of credit ratings from national rating agencies, the implementation of standard methods for pricing loans and the growth of standard trading practices and arrangements." *Id.* at 14. The notes are "specifically designed to be traded." de Fontenay, *supra*, at 743.

Market information providers facilitate that trading. One company touts its "mark-to-market loan pricing service [that] covers almost 6,000 loans from all active sec-

ondary issuers," "provid[ing] investors and portfolio managers with valuations for leveraged and investment grade loans." LSEG Data & Analytics, *Global Loan Pricing Services*, https://www.lseg.com/en/data-analytics/investment-banking/lpc-loan-pricing/global-loan-valuation-and-information. Another advertises "independent bid-offer pricing, analytics and liquidity measures daily for over 6,000 leveraged loan facilities worldwide." S&P Global Market Intelligence, *Loan and CLO Pricing Data*, https://www.spglobal.com/marketintelligence/en/mi/products/pricing-data-loans.html. Syndicated loan notes are now assigned the same "CUSIP" codes used to identify stocks and bonds. See *CUSIP Global Services Launches New CUSIP-Based Entity Identifier for the $5T Syndicated Loan Market*, GlobeNewswire, Aug. 2, 2023.

Syndicated loans ordinarily have modest transfer restrictions. "Assignments typically require the consent of the borrower and agent," and "[t]he loan document usually sets a minimum assignment amount" such as $1 million or $5 million. PitchBook, *Leveraged Loan Primer* 19 (2022). Those restrictions have not prevented vibrant secondary markets from flourishing.

3. Syndicated loan notes look more and more like high-yield "junk" bonds. Market observers regularly comment on that "convergence." See, *e.g.*, Matthew Diczok & Brian T. Wilczynski, Merrill, *Leveraged Loans: Loans Are the New Bonds* 4 (Feb. 2020) ("Leveraged loans are the new floating-rate high-yield bonds"); Gary D. Chamblee & Jolie Amie Tenholder, *Converging Markets: Leveraged Syndicated Loans and High-Yield Bonds*, Com. Lending Rev., Nov.-Dec. 2005, at 7, 7 ("The leveraged syndicated loan market and high-yield bond market * * * have increasingly begun to compete * * * ."); de Fontenay, *supra*, at 742 (noting "striking and rapid convergence").

"[C]orporate bonds" are "plainly within the purview of the [Securities] Acts." *Reves*, 494 U.S. at 69. Yet the decision below exempts syndicated loans. That decision results in different treatment for two instruments that increasingly resemble and compete with one another.

B. Syndicated Loans Threaten Serious Risks to Investors

Syndicated loans pose grave risks. The market is enormous and growing rapidly. And the decision below leaves investors without adequate remedies.

1. The stakes could not be higher. "[T]he syndicated loan market has become the dominant way for issuers around the world to tap banks and other institutional capital providers for loans." PitchBook, *supra*, at 1. The Federal Reserve estimates that there are over $2.9 *trillion* in syndicated loans outstanding. See Bd. of Govs. of Fed. Rsrv. Sys. *et al.*, *Shared National Credit Program: 1st and 3rd Quarter 2022 Reviews* 4 (Feb. 24, 2023).

The syndicated loan market has grown at a phenomenal pace—more than 15.8% per year on average since 2000. Su *et al.*, *supra*, at 4-5. The market is now larger than both total consumer credit card debt ($1.06 trillion) and total auto loans ($1.16 trillion). *Id.* at 4.

2. While traditional commercial banks can protect themselves through due diligence, investors who purchase syndicated loan notes have no comparable opportunity. "[F]requently, investors have neither the means nor the time to conduct meaningful diligence. The loan is generally marketed to investors very late in the process after nearly all the terms are settled * * * ." Crenshaw, *supra.* Investors are "large groups of dispersed creditors" that "hav[e] no relationship with the borrowing company." de Fontenay, *supra*, at 742. Many "lack the extensive staff

and in-house capability possessed by banks." Chamblee & Tenholder, *supra*, at 8.

Arranging banks, meanwhile, have no incentive to conduct their own due diligence. Banks "rarely hold much (if any) of the underlying loan" after syndicating it. Nuveen, *Not Created Equal* 3 (2018). "As a result, the credit decision * * * is not driven by the fundamental credit quality of the loan or the strength of the business, but rather by what [banks] are able to sell * * * ." *Ibid.* Regulators have raised concerns about these "[l]ooser underwriting standards." U.S. Gov't Accountability Off., GAO-21-167, *Financial Stability* 26 (Dec. 2020).

3. Other features aggravate those risks. Traditional loans have covenants that "give[ ] the lender significant control over the borrower's capital structure." de Fontenay, *supra*, at 745. Syndication has produced a "rapid proliferation of 'covenant-lite' loans" that lack those protections. *Id.* at 745-746. "[C]ovenant-lite loans accounted for 84 percent of leveraged loans issued in January-September 2019, compared to 30 percent or less each year between 2003 and 2010." GAO, *supra*, at 27; see also Abby Latour, S&P Global Market Intelligence, *Covenant-Lite Deals Exceed 90% of Leveraged Loan Issuance, Setting New High* (Oct. 8, 2021).

Syndicated loans also contain so-called "big boy" representations "designed to protect the bank intermediating the transaction from liability by requiring investors to represent that they have done their own diligence" despite the practical obstacles. Crenshaw, *supra*. The courts below invoked such disclaimers to reject the Trustee's common-law claims here. App., *infra*, 68a-71a; Dist. Ct. Dkt. 181 at 42-44. Those disclaimers further undermine any incentive to provide thorough disclosures.

Syndicated loans create grave risks of insider trading. "In many cases, * * * investors negotiate for access to nonpublic information about the issuer, which is not available to all holders of its notes." Crenshaw, *supra*. Those investors can then "trade on the basis of this inside information." *Ibid.* There is now "growing concern among issuers, lenders, and regulators that this migration of once-private information * * * could lead to illegal trading." PitchBook, *supra*, at 5.

Meanwhile, issuer credit quality has deteriorated. "Leveraged loans are generally made to lower-rated corporate borrowers, which typically have high debt levels." Frank Martin-Buck, *Leveraged Lending and Corporate Borrowing*, 13 FDIC Q., No. 4, 2019, at 41, 44.

4. Those risks threaten retail investors no less than sophisticated institutions. "Retail investors can access the broadly syndicated loan market through registered investment funds." BlackRock, *Non-Bank Lending: A Primer* 1 (2019). As a result, "[r]etail investors have enormous exposure to this market." Crenshaw, *supra*. "Funds investing in [syndicated loans] have been heavily marketed to retail investors in recent years as a hedge against rising interest rates." *Ibid.* Mutual funds and pension funds now hold approximately 25% of syndicated loans. See Su *et al.*, *supra*, at 5-6 & fig. 2.

Bank regulations do not adequately protect investors. Bank oversight focuses on "the health of [the] bank." GAO, *supra*, at 12; see, *e.g.*, Off. of Comptroller of Currency *et al.*, *Interagency Guidance on Leveraged Lending*, 78 Fed. Reg. 17,766, 17,771 (Mar. 22, 2013). "Banking law * * * does not provide purchasers with the rights and remedies that would be available under the federal securities laws," such as a cause of action for fraud. Richard Y. Roberts & Randall W. Quinn, *Leveling the Playing Field: The Need*

for Investor Protection for Bank Sales of Loan Participations, 63 Fordham L. Rev. 2115, 2128 (1995).

This case illustrates those shortcomings. Banks lent Millennium over $300 million, but when they learned about the company's legal risks, they offloaded that debt onto unsuspecting investors through a syndicated loan. App., *infra*, 4a-6a. Millennium's management suggested disclosing the risks, but the banks refused on the ground that the offering memorandum—despite looking just like a prospectus—was "not [an] SEC document." C.A. App. 40-44 ¶¶72-76. The Second Circuit's decision denies those defrauded investors any remedy.

The risks of syndicated loans "may be reaching a scale that could affect the financial system more broadly." Crenshaw, *supra*. "The echoes of the 2008 financial crisis are hard to ignore." *Ibid.* The "higher leverage levels, worse credit ratings, weak covenant packages, [and] loan-only capital structures * * * mean that future credit losses may be materially higher in the next recession." Diczok & Wilczynski, *supra*, at 5.

C. The SEC Has Repeatedly Expressed Concerns About Unregulated Loan Investments

The SEC has sounded the alarm. In case after case, it has highlighted the dangers of excluding such loan investments from the securities laws.

1. In *Reves*, the SEC filed an amicus brief supporting a broad interpretation of the term "notes." SEC Br. in No. 88-1480 (July 27, 1989). It warned that excluding notes from the securities laws would "threaten[] to undermine the Commission's law enforcement efforts." *Id.* at 1-2. It urged the Court to adopt the Second Circuit's family-resemblance test and presume that all notes are

securities absent a "strong family resemblance" to a traditionally excluded category. *Id.* at 10-23.

After *Reves*, the SEC weighed in again in *Banco Espanol de Credito* v. *Security Pacific National Bank*, 973 F.2d 51 (2d Cir. 1992), cert. denied, 509 U.S. 903 (1993). It urged that the loan participations at issue there were securities because they did not "strongly resemble any of the notes on the *Reves* list." SEC Br. in No. 91-7563, at 20 (2d Cir. Jan. 22, 1992). In particular, they did not resemble commercial bank loans for current operations because they were not "individualized transactions in which the banks are in a superior position to * * * investigate the borrower." *Id.* at 23.

When the Second Circuit rejected the SEC's position, the SEC urged the court to rehear the case, warning of "significant harm * * * to the regulation of the large loan note market." SEC Reh'g Br. in No. 91-7563, at 2 (2d Cir. July 16, 1992). After the Second Circuit refused, this Court called for the views of the Solicitor General. 506 U.S. 1077 (1993). The United States urged that the Second Circuit's decision was "open to serious question," that its application of *Reves* was "flawed," and that the issues "could well * * * [be] suitable for review by this Court at some point." U.S. Br. in No. 92-913, at 9-10, 17-18 (June 4, 1993). After this Court denied review, an SEC Commissioner and SEC Senior Litigation Counsel publicly criticized the Second Circuit's decision. Richard Y. Roberts & Randall W. Quinn, *Leveling the Playing Field: The Need for Investor Protection for Bank Sales of Loan Participations*, 63 Fordham L. Rev. 2115, 2115 nn.*, **, 2116-2117 (1995).

2. The decision below relied heavily on the *Banco Espanol* decision the SEC criticized. See App., *infra*, 26a-29a. Indeed, it went even further than *Banco Espanol*.

While the issuer in *Banco Espanol* used the proceeds "to finance its current operations," 973 F.2d at 55, Millennium used the proceeds to pay off existing lenders and pay an enormous dividend, App., *infra*, 6a. And while *Banco Espanol* involved claims by only 11 investors in 17 transactions, 973 F.2d at 51, 54, Millennium's notes were distributed to over 400 investors even before trading on secondary markets, App., *infra*, 26a-27a n.94.

The Second Circuit requested the SEC's views below. App., *infra*, 32a n.117. But after multiple extensions of time, the SEC reported that, "[d]espite diligent efforts to respond to the Court's order and provide the [SEC's] views, the staff is unfortunately not in a position to file a brief." *Ibid.* According to news reports, the SEC had concluded that syndicated loans are securities, but held off filing a brief following industry lobbying and diverging views from other regulators. See pp. 10-11, *supra*.

SEC Commissioner Crenshaw has since warned that "much of this market is not subject to meaningful regulation and investors are being put at risk." Caroline A. Crenshaw, *In-Securities: What Happens When Investors in an Important Market Are Not Protected? Remarks to the Center for American Progress* (Oct. 11, 2023). Citing the decision below, she urged that the market "has continued to grow and evolve * * * in ways that further undermine investor protections." *Id.* at text & n.20.

Time and again, the SEC and its members have emphasized the need for investor protection and rejected narrow interpretations like the one below. That conflict between the expert federal agency and the decision below underscores the need for this Court's review.

D. Courts Struggle To Apply *Reves*

Reves has proved unpredictable and unworkable. The uncertainty highlights the need for review.

1. Courts applying *Reves* regularly reach different results. Compare, *e.g.*, *SEC* v. *Hartman Wright Grp., LLC*, No. 19-CV-02418, 2021 WL 960543, at *1, 5-7 (D. Colo. Mar. 15, 2021) (loan participations sold to 20 investors were securities), *Fox* v. *Dream Tr.*, 743 F. Supp. 2d 389, 397-398 (D.N.J. 2010), and *SEC* v. *Radical Bunny, LLC*, No. CV09-1560, 2011 WL 1458698, at *4 & n.4 (D. Ariz. Apr. 12, 2011), aff'd, 532 F. App'x 775 (9th Cir. 2013), with *First Citizens Fed. Sav. & Loan Ass'n* v. *Worthen Bank & Tr. Co.*, 919 F.2d 510, 515-516 (9th Cir. 1990) (not securities). The reasons for the different outcomes are often not obvious and underscore the uncertainty inherent in *Reves*'s multifactor test.

Courts profess difficulty applying *Reves*. One court lamented that "*Reves* * * * failed to articulate the method for applying the four factors." *Nye Cap. Appreciation Partners, LLC* v. *Nemchik*, No. 5:08-CV-02834, 2010 WL 3835108, at *5 (N.D. Ohio Sept. 29, 2010), aff'd, 483 F. App'x 1 (6th Cir. 2012). Another complained that "*Reves* was not clear as to whether all four factors must be met" and that "it remains unclear how much weight each factor carries." *Matthews* v. *Stolier*, 207 F. Supp. 3d 678, 683 (E.D. La. 2016).

Courts disagree over how to apply particular factors. In *Stoiber* v. *SEC*, 161 F.3d 745 (D.C. Cir. 1998), cert. denied, 526 U.S. 1069 (1999), for example, the D.C. Circuit held that the third *Reves* factor was a "one-way ratchet" that could justify treating notes as securities but could not weigh *against* such treatment. *Id.* at 751. The court below rejected that interpretation, holding that the

third *Reves* factor *could* weigh against treating notes as securities. App., *infra*, 27a n.96.

2. The Second Circuit's application of *Reves* in this case illustrates the test's subjective and unpredictable nature. For example, the court held that Millennium's motivations were "commercial" rather than "investment" because the company used the proceeds to pay off its existing credit facilities and to pay an enormous dividend to shareholders. App., *infra*, 23a-24a. That holding defines "commercial" so broadly as to be meaningless. Millennium raised billions of dollars, not to fund current operations, but so existing lenders and owners could cash out their holdings and leave new investors saddled with the legal risks they concealed. Those are not the motives of a traditional commercial bank loan.

Similarly, even though Millennium's notes were distributed to 400 initial investors and then traded on secondary markets, the court held that there was no distribution to the "general public" because the notes were subject to modest transfer restrictions. App., *infra*, 24a-25a. The court did not assess the *practical impact* of those restrictions. A $1 million minimum is trivial for most institutional investors. And the court cited no evidence that Millennium or JP Morgan had ever objected to a transfer. *Reves*, moreover, looked to whether instruments were made available for "common trading" to a "broad segment" of the public, not whether they were available to the *entire* "general public." 494 U.S. at 68. The decision below shows that courts have no idea where to draw the line.

The court applied the third factor by counting up references to "lenders" and "investors" in the offering documents and finding more of the former. App., *infra*, 28a-

29a. That rationale ignores that the notes are both loans *and* investments—just like bonds. *Reves*, 494 U.S. at 69.

Finally, the court relied on banking regulators' "policy guidelines" for syndicated loans. App., *infra*, 30a-32a. But those guidelines provide no mechanism for investors to obtain compensation when a bank defrauds them.

The problem here is not just a misapplication of *Reves*. The court's strained interpretations underscore the inherently unpredictable nature of a test that turns on "what Congress was attempting to accomplish" rather than what the statute actually says.

3. Many state blue sky laws have similar definitions of "security." See, *e.g.*, Cal. Corp. Code § 25019; Mass. Gen. Laws 110A § 401(k). The federal laws, after all, were modeled on their state counterparts. See p. 6, *supra*. Courts regularly look to *Reves* to interpret those state laws too. See, *e.g.*, App., *infra*, 19a n.58. *Reves*'s vague and unpredictable standards thus have repercussions for both federal and state regulators. That broad impact underscores the need for review.[1]

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[1] Both courts below accepted the Trustee's position that the relevant state laws follow *Reves*. App., *infra*, 19a n.58. This Court has repeatedly recognized the propriety of review where a federal-law determination is an ingredient of a state-law claim. See, *e.g.*, *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 816 (1986) (emphasizing that "this Court retains power to review the decision of a federal issue in a state cause of action"); *Three Affiliated Tribes of Fort Berthold Rsrv.* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984) ("It is * * * well established * * * that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.").

II. The Court Should Restore The Securities Laws To The Scope Congress Mandated

The securities laws expressly cover "any note." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). Syndicated loans are "notes." See Crenshaw, *supra* (explaining that "[e]vidence of the [syndicated loan] obligation is generally in the form of a 'note'"); C.A. App. 18 ¶ 4 (describing "Notes"). *Reves* permits departures from the statutory text only in narrow circumstances: where an instrument bears such a "strong resemblance" to a traditionally exempt category as to justify deviating from the statutory command. 494 U.S. at 67. The court below disregarded those principles. And if *Reves* allows that result, the Court should revisit the decision.

A. The Securities Laws Provide Broad Protections

The text, structure, and history of the securities laws confirm that Congress intended broad protections for note investors.

1. The securities laws expressly define "security" to include "any note." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). When Congress enacted those laws, "note" was a broad term that encompassed any "written or printed paper acknowledging a debt, and promising payment." *Webster's New International Dictionary* 1668 (2d ed. 1934). Indeed, the term "security" derives from the phrase "security for money," a term that encompassed "any written debt instrument." Gary S. Rosin, *Historical Perspectives on the Definition of a Security*, 28 S. Tex. L. Rev. 575, 578, 599-602 (1987). Moreover, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). The phrase "any note" thus evinces a broad intent to cover debt instruments.

The statutes' exemptions confirm that scope. Members of Congress raised concerns about regulating commercial paper, another bank-favored debt instrument. *House Hearing* 179-183. Congress responded, not by inviting courts to invent their own tests, but by enacting a *statutory exception*. 15 U.S.C. §§ 77c(a)(3), 78c(a)(10).

This Court has made clear that, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001). Here, Congress specifically focused on the statutes' application to ordinary banking instruments and prescribed the exception it considered appropriate. That exception applies only to debt of a particular maturity (less than nine months). 15 U.S.C. §§ 77c(a)(3), 78c(a)(10). And with respect to the Securities Act, it applies only to registration requirements, not antifraud provisions. *Id.* §§ 77*l*(a)(2), 77q(c). Further judicial exemptions based on speculation about "what Congress was attempting to accomplish," *Reves*, 494 U.S. at 63, thwart that careful design.

2. The federal securities laws, moreover, were modeled on the Uniform Sale of Securities Act, which tracked state blue sky laws of the era. See p. 6, *supra*. Those state blue sky laws are thus highly relevant when interpreting the federal statutes. See, *e.g.*, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184-185 (1994).

Those blue sky laws applied broadly to notes. Many contained express exemptions for discrete types of notes, confirming that they otherwise applied. See, *e.g.*, Act of Mar. 10, 1911, ch. 133, § 1, 1911 Kan. Sess. Laws 210, 210 (regulating "any stocks, bonds or other securities" while exempting "notes secured by mortgages on real estate

located in the state of Kansas"); Act of Mar. 11, 1913, ch. 117, §1, 1913 Idaho Gen. Laws 454, 454 (similar); Act of May 2, 1913, No. 143, §1, 1913 Mich. Pub. Acts 243, 243 (regulating "stocks, bonds or other securities" while exempting "commercial paper or other evidence of indebtedness running not more than nine months"); Act of Mar. 13, 1919, ch. 111, §2(d), 1919 Utah Laws 309, 310 (exempting "[c]ommercial paper or negotiable promissory notes due not more than three years from their date").

Courts applied those statutes according to their terms. California's law, for example, defined "security" to include "[a]ll bonds, debentures, and evidences of indebtedness," with no exemption for mortgage notes sold to the public. See Act of May 23, 1925, ch. 447, §2(7), 1925 Cal. Stat. 962, 963-964. The California Supreme Court thus upheld a conviction for the unlawful public sale of mortgage notes. See *Ex parte Leach*, 215 Cal. 536, 546 (1932); see also Rosin, *supra*, at 609 ("The few early blue sky cases that involve evidences of indebtedness are consistent with the common-law view that 'written assurances for the return or payment of money' are securities."). State laws thus confirm what the federal statutes themselves make clear: The securities laws apply broadly to notes absent an express exemption.[2]

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[2] State courts also held that notes were "securities" in other contexts. See, *e.g.*, *Jennings* v. *Davis*, 31 Conn. 134, 139-140 (1862) (real estate); *J.L. Taylor & Co.* v. *Pickett*, 3 N.W. 514, 517 (Iowa 1879) (liquor law); *Bank of Com.* v. *Hart*, 55 N.W. 631, 633 (Neb. 1893) (bank charter); *Wagner* v. *Scherer*, 89 A.D. 202, 203 (N.Y. App. Div. 1903) (liquor tax); *Reagan* v. *District of Columbia*, 41 App. D.C. 409, 412 (D.C. Cir. 1914) (loan-shark law); *Peaslee* v. *Rounds*, 94 A. 263, 265 (N.H. 1915) (personal will); see also *City Bank Farmers Tr. Co.* v. *Lewis*, 189 A. 178 (Conn. 1937) (collecting authorities).

B. The Decision Below Exacerbates *Reves*'s Departure from the Statutory Text

This Court took an unusual step in *Reves*. It held that Congress neither meant what it said, nor said what it meant, when it defined "security" to include "any note." That phrase, the Court stated, "should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish." 494 U.S. at 63. The decision below takes that narrow invitation to an extreme that neither this Court nor Congress could have contemplated.

Reves itself emphasizes that, "because the [statutes] define 'security' to include 'any note,' [courts must] begin with a *presumption* that every note is a security." 494 U.S. at 65 (emphasis added). "[T]hat presumption may be rebutted only by a showing that the note bears a *strong resemblance* * * * to one of the enumerated categories" traditionally excluded. *Id.* at 67 (emphasis added). Although the Court identified four factors to consider as "guidance" when evaluating that "resemblance," the Court never suggested that those factors were a *replacement* for the family-resemblance test. *Id.* at 65-67.

Yet that is how the Second Circuit treated the factors below. The court paid lip service to the "presumption that every note is a security." App., *infra*, 21a. And it concluded, with *one sentence* of analysis, that syndicated loans bear a "strong resemblance" to a traditionally exempt category (although it misdescribed the category in a way that substantially expanded its scope). Compare *id.* at 33a ("[L]oans issued by banks for commercial purposes."), with *Reves*, 494 U.S. at 65 ("notes evidencing loans by commercial banks *for current operations*" (emphasis added)). The vast majority of the court's opinion was devoted to the four factors, which the court applied, not

as mere "guidance" in comparing syndicated loans to a traditionally exempt category, but as a freestanding test for whether syndicated loans *should* be regulated as "securities." App., *infra*, 22a-33a.

In no conceivable sense do syndicated loan notes bear a "strong resemblance" to traditional commercial bank loans for current operations. Traditional loans arise out of a direct, long-term relationship between a borrower and a bank that has a motive and meaningful opportunity to perform due diligence and protect itself through loan covenants. In a syndicated loan, by contrast, arranging banks distribute notes to hundreds of investors who are largely mutual funds, pension funds, and other investment vehicles. The notes then trade on active secondary markets with the help of high-yield analysts and price quotations. Investors have no meaningful ability to conduct due diligence, and the "covenant-lite" status of the loans deprives them of even modest protections.

Under the Second Circuit's decisions in *Banco Espanol* and now this case, *Reves* has morphed from a test that exempts only specific discrete categories into a subjective, open-ended balancing test. That approach has no basis in *Reves*, let alone the statutory text.

C. The Court Should Revisit *Reves* As Necessary

While the Second Circuit departed from *Reves*, *Reves* itself departed from statutory text. If that departure cannot be cabined, the Court should reconsider it.

1. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Congress expressly defined "security" to include "any note." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). And syndicated

loans are, in fact, "notes." See Crenshaw, *supra*; C.A. App. 18 ¶4. The conclusion is inescapable: Syndicated loan notes are securities because that is how Congress defined the term. *Reves*'s theory that "'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish," ignores those basic principles of statutory construction. 494 U.S. at 63.

The four *Reves* factors are completely untethered from the statutory text. Whether an issuer is raising funds for "commercial" or "investment" purposes, for example, has no bearing on whether an instrument is a security under the definitions Congress adopted. Companies issue stocks or bonds to finance commercial operations all the time. And Millennium's purpose was to raise over a billion dollars so its existing lenders and owners could take the money, jump ship, and leave new investors holding the bag—a motive that is not "commercial" in any reasonable sense.

Similarly, whether a company offers financial instruments to the general public or only to some subset may be relevant to how the sales are regulated, but it has no bearing on whether the instruments are "securities." Congress and the SEC often relax requirements where offerings are limited to sophisticated investors. See, *e.g.*, 17 C.F.R. §230.144A. Those exemptions do not mean the instruments cease to be securities altogether.

Whether transaction documents *refer* to instruments as "loans" or "securities" is even less relevant. If particular notes are securities under the definitions Congress adopted, deal lawyers cannot change their status simply by calling them something else.

Finally, the fact that another body of law may also apply to an instrument is no basis for disregarding stat-

utory definitions. "When confronted with two Acts of Congress allegedly touching on the same topic, [a court] is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (quotation marks omitted). A party claiming implied repeal faces a "stout uphill climb" and must show a "clearly expressed congressional intention." *Ibid.* That Congress authorized bank regulators to issue high-level "policy guidelines" comes nowhere close.

2. To be sure, the securities laws include general prefatory language stating that their definitions apply "unless the context otherwise requires." 15 U.S.C. §§77b(a), 78c(a). In *Marine Bank* v. *Weaver*, 455 U.S. 551 (1982), this Court relied on that language to conclude that certificates of deposit are not "securities." *Id.* at 556-559; see also *Exch. Nat'l Bank*, 544 F.2d at 1137-1138. Those "context" clauses more naturally refer to the *statutory* context in which a term appears, not the *factual* circumstances of a case. See *Ruefenacht* v. *O'Halloran*, 737 F.2d 320, 331 (3d Cir. 1984), aff'd, 471 U.S. 701 (1985). But even applying them more broadly, they cannot support the test adopted below. It is one thing to say that context "requires" an exclusion where an instrument *actually falls within* a traditionally excluded category. But it is something else entirely for courts to use that language as a springboard for judicial improvisation. Context cannot "require[]" exclusion from the securities laws merely because a judicially crafted four-factor test weighs against such treatment.

The pure family-resemblance test that the Second Circuit applied before *Reves*, and that the SEC advocated in that case, is a fairer interpretation of the statutory text. There may well be some "notes"—such as a typical home

mortgage note—that Congress could not reasonably have intended to bring within the securities laws. The Second Circuit thus held in *Exchange National Bank* that, while notes are presumptively securities, the presumption may be overcome if a note bears a "strong family resemblance" to a traditionally exempt category. 544 F.2d at 1137-1138. The SEC urged this Court to adopt the same standard. See SEC Br. in No. 88-1480, at 10-23 (July 27, 1989). Neither the Second Circuit nor the SEC advocated for any open-ended four-factor balancing test. This Court came up with that additional "guidance" on its own. See *Reves*, 494 U.S. at 65-67.

Reves's avowedly non-literal interpretation is out of step with this Court's settled approach to statutory construction. The Court should revisit that decision and replace its four-factor test with a historically and textually grounded standard.

III. This Case Is An Excellent Vehicle

This case is an excellent vehicle for review. The Second Circuit decided the issues in a published opinion that addressed *Reves* at length. And this case involves a paradigmatic syndicated loan that illustrates all the risks those instruments present.

Millennium issued $1.775 billion in syndicated loan notes, not to fund commercial operations, but to pay off existing lenders and pay a massive dividend. App., *infra*, 6a. The court of appeals agreed that investors purchased the notes because they "expected to receive a 'valuable return.'" App., *infra*, 23a. Respondents distributed the notes broadly to over 400 mutual funds, pension funds, and other investors. *Id.* at 26a-27a n.94, 41a, 56a. The notes then traded on secondary markets, subject only to modest and commonplace restrictions. *Id.* at 11a-12a.

This case also starkly illustrates the consequences of excluding syndicated loan notes from the securities laws. Investors suffered severe losses after respondents concealed the legal risks that led to Millennium's bankruptcy. App., *infra*, 48a-50a. Management suggested disclosing the risks, but respondents refused on the ground that the offering materials were "not [an] SEC document." C.A. App. 40-41 ¶¶72-75. Investors have now been left without a remedy.

The syndicated loan market is a multi-trillion-dollar industry that grows larger every year. As Commissioner Crenshaw warned, "investors are being put at risk," and "systemic financial issues are lurking in the market." Crenshaw, *supra*. This case presents an excellent opportunity to address whether those risks fall outside the purview of the securities laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2022
NO. 21-2726

MARC S. KIRSCHNER, solely in his capacity as Trustee of The Millennium Lender Claim Trust,

Plaintiff-Appellant,

v.

JP MORGAN CHASE BANK, N.A., JP MORGAN SECURITIES LLC, CITIBANK, N.A., BANK OF MONTREAL, BMO CAPITAL MARKETS CORP., SUNTRUST ROBINSON HUMPHREY, INC., SUNTRUST BANK, CITIGROUP GLOBAL MARKETS, INC.,

Defendants-Appellees.*

On Appeal from the United States District Court
for the Southern District of New York

OPINION

Argued: March 9, 2023
Decided: August 24, 2023

Before CABRANES, BIANCO, and PÉREZ, *Circuit Judges*.

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* The Clerk of Court is directed to amend the caption as set forth above.

Plaintiff-Appellant Marc S. Kirschner brought a series of claims in New York state court arising out of a syndicated loan transaction facilitated by the defendants-appellees, a group of financial institutions. Plaintiff's appeal presents two issues. The first issue presented is whether the United States District Court for the Southern District of New York (Paul G. Gardephe, *Judge*) had subject matter jurisdiction over this action pursuant to the Edge Act, 12 U.S.C. § 632. The second issue presented is whether the District Court erroneously dismissed plaintiff's state-law securities claims on the ground that he failed to plausibly suggest that notes issued as part of the syndicated loan transaction are securities under *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

We hold that the District Court had jurisdiction under the Edge Act because defendant-appellee JP Morgan Chase Bank, N.A. engaged in international or foreign banking as part of the transaction giving rise to this suit. We also hold that the District Court did not erroneously dismiss plaintiff's state-law securities claims because plaintiff failed to plausibly suggest that the notes are securities under *Reves*.

We accordingly **AFFIRM** the District Court's September 24, 2018 order determining that it had jurisdiction pursuant to the Edge Act and **AFFIRM** its May 22, 2020 order dismissing plaintiff's state-law securities claims.

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& New York, NY, *for Defendants-Appellees JP Morgan Chase Bank, N.A. and J.P. Morgan Securities LLC.*

Benjamin S. Kaminetzky, Lara Samet Buchwald, and Tina Hwa Joe, *on the brief*, Davis Polk & Wardwell LLP, New York, NY, *for Defendants-Appellees Citibank N.A. and Citigroup Global Markets Inc.*

J. Emmett Murphy and John C. Toro, *on the brief*, King & Spalding LLP, New York, NY, *for Defendants-Appellees SunTrust Robinson Humphrey, Inc. and SunTrust Bank.*

Steve M. Dollar and Sean M. Topping, *on the brief*, Norton Rose Fulbright US LLP, New York, NY, *for Defendants-Appellees BMO Capital Markets Corp. and Bank of Montreal.*

JOSÉ A. CABRANES, *Circuit Judge*:

Plaintiff-Appellant Marc S. Kirschner brought a series of claims in New York state court arising out of a syndicated loan transaction (the "Transaction")[1] facilitated by the defendants-appellees, a group of financial institutions. Plaintiff's appeal presents two issues. The first issue presented is whether the United States District Court for the Southern District of New York (Paul G. Gardephe, *Judge*) had jurisdiction over this action pursu-

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[1] "A syndicated loan is a loan extended by a group of financial institutions (a loan syndicate) to a single borrower." *Syndicated Loan Portfolios of Financial Institutions*, Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/releases/efa/efa-project-syndicated-loanportfolios-of-financial-institutions.htm (last visited July 30, 2023); *see also* Fed. Deposit Ins. Corp., Risk Management Manual of Examination Policies, *Loans* § 3.2-73 (May 2023) ("*FDIC Manual*") ("A syndicated loan involves two or more banks contracting with a borrower, typically a large or middle market corporation, to provide funds at specified terms under the same credit facility.").

ant to the Edge Act, 12 U.S.C. §632. The second issue presented is whether the District Court erroneously dismissed plaintiff's state-law securities claims on the ground that he failed to plausibly suggest that notes issued as part of the Transaction (the "Notes") are securities under *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

We hold that the District Court had jurisdiction under the Edge Act because defendant-appellee JP Morgan Chase Bank, N.A. engaged in international or foreign banking as part of the Transaction. We also hold that the District Court did not erroneously dismiss plaintiff's state-law securities claims because plaintiff failed to plausibly suggest that the Notes are securities under *Reves*.

We accordingly **AFFIRM** the District Court's September 24, 2018 order determining that it had jurisdiction pursuant to the Edge Act and **AFFIRM** its May 22, 2020 order dismissing plaintiff's state-law securities claims.[2]

I. BACKGROUND

We describe the facts as set forth in the complaint and the documents incorporated therein.[3] We recount only those necessary to explain our decision.

A. Millennium

Millennium Health LLC, Inc. f/k/a Millennium Laboratories ("Millennium") was a California-based urine drug testing company. In March 2012, defendants-appellees JP Morgan Chase Bank, N.A. ("JP Morgan Chase"), JP Morgan Securities, LLC ("JP Morgan Securities," and

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[2] We address the remaining issues raised on appeal by a summary order entered this same day.

[3] *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) ("A complaint is deemed to include any written instrument attached to it as an exhibit or any statement or documents incorporated in it by reference." (internal quotation marks and citation omitted)).

together with JP Morgan Chase, "JP Morgan"), SunTrust Robinson Humphrey, Inc., SunTrust Bank, and Bank of Montreal,[4] executed a credit agreement (the "2012 Credit Agreement") providing Millennium a $310 million term loan and a $20 million revolving loan. Two days before the 2012 Credit Agreement closed, the United States Department of Justice ("DOJ") issued a subpoena to Millennium in connection with an investigation into whether Millennium had violated federal health care laws. At the time, Millennium was also embroiled in litigation with a competitor, Ameritox Ltd. Ameritox alleged that Millennium had violated federal anti-kickback statutes and that such violations "constituted 'unfair competition.'"[5]

As the DOJ investigation and Ameritox litigation continued, JP Morgan began to consider ways to refinance the 2012 Credit Agreement. Plaintiff alleges that "by the end of February 2014," the "only" way to refinance was "a huge institutional financing that would" eliminate the roughly $300 million that Millennium still owed under the 2012 Credit Agreement.[6]

B. The March 16, 2014 Commitment Letter

The "huge institutional financing" principally consisted of a $1.775 billion term loan to Millennium (the "Term Loan"). By letter dated March 16, 2014, JP Morgan, Citi,[7] BMO Capital Markets, Bank of Montreal, SunTrust Robin-

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[4] We refer to these entities jointly, along with defendants-appellees BMO Capital Markets Corp., Citibank, N.A., and Citigroup Global Markets Inc., as "defendants."

[5] Joint App'x ("J.A.") 29.

[6] *Id.* at 32.

[7] The letter defines "Citi" to "mean Citigroup Global Markets Inc., Citibank, N.A., Citicorp USA, Inc., Citicorp North America, Inc. and/or any of their affiliates as Citi shall determine to be appropriate to provide the services contemplated herein." *Id.* at 360.

son Humphrey, and SunTrust Bank (the "Initial Lenders") agreed to provide Millennium the Term Loan[8] and a $50 million revolving loan.[9] Millennium, in turn, planned to use the Term Loan to (1) pay the outstanding amount due under the 2012 Credit Agreement ($304 million), (2) pay a shareholder distribution ($1.27 billion), (3) "redeem outstanding warrants, debentures and stock options" ($196 million) and (4) pay fees and expenses related to the Transaction ($45 million).[10]

The Initial Lenders and Millennium further agreed that the Initial Lenders could "syndicate the [Term Loan] to a group of lenders identified by the 'Lead Arrangers,'" JP Morgan Securities and Citigroup Global Markets.[11] The Lead Arrangers agreed to "commence the syndication of the [Term Loan] . . . promptly," while Millennium "agree[d] actively to assist the Lead Arrangers in completing a syndication satisfactory to [it] and the Lead Arrangers."[12]

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[8] The Term Loan was initially for $1.765 billion and was later increased to $1.775 billion.

[9] The relevant loan documents refer to both the Term Loan and the revolving loan as "Senior Secured Facilities." Plaintiff's claims arise out of events surrounding the Term Loan. *See* J.A. 17 ("This Complaint relates to a $1.775 billion transaction . . . ."). The claims do not rest on allegations involving the revolving loan. For clarity, we refer only to the Term Loan, even when the relevant loan document refers to the "Senior Secured Facilities."

[10] *Id.* at 582.

[11] *Id.* at 361, 376. The commitment letter further established that JP Morgan Chase would act as the "Administrative Agent," and "in such capacity" be entitled "to exercise such powers and perform such duties as are expressly delegated to" it pursuant to loan documents. *Id.* at 361, 376, 537-38.

[12] *Id.* at 361. In the finance community, a "[l]oan syndication" refers to "[t]he process of involving multiple lenders in providing various portions of a loan." Off. of the Comptroller of Currency, *Leveraged Lending: Comptroller's Handbook* 63 (2008) ("*Comptroller's Hand-*

C. The Confidential Information Memorandum

To facilitate the syndication effort, JP Morgan and Citi prepared a "Confidential Information Memorandum" about Millennium.

The Confidential Information Memorandum most consistently refers to its intended audience as potential "lenders,"[13] although its cover page uses the term "Public Side Investors."[14] The other relevant documents also most consistently employ the term "lender" and not "investor."[15] Accordingly, we too refer to those who purchased Notes as "lenders."[16]

The Confidential Information Memorandum contains numerous disclaimers. For example, it warns potential lenders that the material did "not purport to be all-inclusive" and was "prepared to assist potential lenders in making their own evaluation of [Millennium] and the [Term Loan]."[17] It also advises that each potential lender "should perform its own independent investigation and analysis of the [Term Loan] or the transactions contem-

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book"); *see also supra*, note 1 (providing definitions for "syndicated loan").

[13] *See, e.g., id.* at 565 ("The information and documents following this Notice . . . have been prepared from information supplied by or on behalf of Millennium . . . and is being furnished by [JP Morgan Securities] . . . to you as a potential lender . . . .").

[14] *Id.* at 561; *see also id.* at 572 (providing a "Public investors dial-in" number). Similarly, a PowerPoint presentation created by Millennium with help from the Lead Arrangers "recast some of the information" in the Confidential Information Memorandum and was called an "Investor Presentation." *Id.* at 40.

[15] *See, e.g., id.* at 446 (preamble to 2014 credit agreement listing parties thereto, including the "Lenders").

[16] This nomenclature is not dispositive of whether the Notes are "securities" under *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

[17] J.A. 566.

plated thereby and the creditworthiness of [Millennium]."[18] And by receiving the Confidential Information Memorandum, each potential lender "represent[ed] that it [was] sophisticated and experienced in extending credit to entities similar to [Millennium]."[19]

If a potential lender wanted to become an actual lender, then it had "to make a final legally binding offer to purchase" the Notes no later than 5 p.m. Eastern Standard Time on April 14, 2014.[20]

D. The Lenders

On April 15, 2014, JP Morgan Securities notified potential lenders with outstanding legally binding offers of the amount of their allocation. At that point, those potential lenders became *actual* lenders because they were "irrevocabl[y]" bound to purchase their allocation of the Term Loan.[21] Those lenders—referred to here as "Parent Lenders"—could then sub-allocate their allocation to investors in their respective funds—referred to here as "Child Lenders." For example, Brigade Capital Management, LP ("Brigade"), a Parent Lender, was allocated

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[18] *Id.*

[19] *Id.* Potential lenders made this representation "[b]y accepting the Confidential Materials [in the Confidential Information Memorandum] for review." *Id.* at 565.

[20] *Id.* at 50.

[21] *Id.* at 428 (an "Institutional Allocation Confirmation" sent by a lender to JP Morgan Chase "confirm[ing] [JP Morgan Chase's] offer to sell, and [the lender's] agreement to purchase" the lender's allocated amount of the Term Loan, "which offer and agreement is irrevocable").

$45 million of the Term Loan and then sub-allocated that $45 million allocation among twenty-three Child Lenders.[22]

In total, sixty-one Parent Lenders received an allocation of the Term Loan. Of those sixty-one Parent Lenders, fifty-nine were domestic entities and two were foreign entities. Approximately half of the roughly four hundred Child Lenders were foreign entities.

E. The Transactions

The Transaction "proceeded in three inter-related and contemporaneous steps" and closed on April 16, 2014.[23]

First, by letter agreement dated April 16, 2014, JP Morgan Securities or its "Lending Affiliate," JP Morgan Chase, agreed to "fund 100%" of the Term Loan.[24]

Second, by letter agreement dated April 16, 2014, Millennium consented to JP Morgan Chase assigning its rights and obligations with respect to the Term Loan to the lenders.

Third, "each individual [lender] . . . became irrevocably committed to [JP Morgan Chase] . . . to purchase" its allocated amount of the Term Loan.[25]

F. The Credit Agreement

In connection with the closing on April 16, 2014, each lender executed an "Assignment and Assumption Agreement" with JP Morgan Chase.[26] The lenders thereby as-

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[22] *See id.* at 423 (email from JP Morgan Securities notifying Brigade of its allocation and providing information on "[l]oan documentation," the allocation, and funding of sub-allocations).

[23] *Id.* at 50.

[24] *Id.* at 400.

[25] *Id.* at 50-51.

[26] *See id.* at 432-33 (Assignment and Assumption Agreement between JP Morgan Chase and Brigade Credit Fund II, LTD ("Brigade Credit"), a lender organized under the laws of the Cayman Islands).

sumed "all of [JP Morgan Chase's] rights and obligations in its capacity as a Lender"[27] under a "Credit Agreement" dated April 16, 2014. The Credit Agreement established the conditions of the Term Loan. By entering the Credit Agreement, each lender represented that it had

> independently and without reliance upon any Agent or any other Lender, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of [Millennium][28] and made its own decision to make its Loans[29] hereunder and enter into this [Credit] Agreement.[30]

The Credit Agreement established that Millennium would pay back the Term Loan over seven years. Millennium was generally obligated to make quarterly payments consisting of a portion of the $1.775 billion principal

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[27] *Id.* at 432; *see id.* at 446 (defining "Lender[ ]" as "the several banks and other financial institutions or entities from time to time parties to this [Credit] Agreement").

[28] The Credit Agreement required that each lender make its own appraisal of, and investigation into, not only Millennium, but also Millennium's "Restricted Subsidiaries" as well as Millennium Lab Holdings II, LLC and its "Restricted Subsidiaries." *See id.* at 539 (Credit Agreement provision referencing "Loan Parties"); *id.* at 468 (defining "Loan Parties" as "each Group Member that is a party to a Loan Document"); *id.* at 464 (defining "Group Members" as "the collective reference to Holdings, the Borrower and their respective Restricted Subsidiaries"); *id.* at 446 (defining Millennium Lab Holdings II, LLC, as "Holdings" and Millennium as the "Borrower"); *id.* at 474 (defining "Restricted Subsidiary").

[29] The Credit Agreement defines "Loan" as "any loan made by any Lender pursuant to th[e] [Credit] Agreement." *Id.* at 468. Here, each lender made a Loan to Millennium consisting of their allocated amount of the Term Loan.

[30] *Id.* at 539.

plus interest. Additionally, to protect lenders were Millennium to default on its payment obligations, the Credit Agreement "create[d] in favor of the Administrative Agent [JP Morgan Chase], for the benefit of the Lenders, a legal, valid and enforceable security interest" in Millennium's collateral.[31]

The Credit Agreement also facilitated the creation of a secondary market for the Notes, subject to certain assignment restrictions. The restrictions include:

- A prohibition on assignment to "a natural person"[32];
- A requirement that Millennium and JP Morgan Chase, acting in its capacity as Administrative Agent, provide written consent to any assignment (subject to certain exceptions)[33]; and
- A requirement that any assignment be for more than $1,000,000, unless, among other things, the assignment was to a "Lender, an affiliate of a Lender, or an Approved Fund or an assignment of the entire remaining amount of the assigning Lender's" allocation.[34]

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[31] *Id.* at 508; *see id.* at 382 (noting that Millennium's obligations under the Credit Agreement were "secured by a perfected first priority security interest in all of its tangible and intangible assets," subject to certain limitations). Additionally, if Millennium failed to timely pay back the lenders, Millennium had to pay a higher interest rate on the Term Loan, with such interest "payable from time to time on demand." *Id.* at 488.

[32] *Id.* at 546.

[33] *See id.* at 546-47.

[34] *Id.* at 547. The Credit Agreement defines "Approved Fund" as "any Person (other than a natural person or a Disqualified Lender) that is engaged in making, purchasing, holding or investing in bank loans and similar extensions of credit in the ordinary course of its business and that is administered or managed by (a) a Lender, (b) an

The Notes began trading on a secondary market "as early as April 15th."[35]

G. Millennium Files for Bankruptcy

As the Transaction proceeded, the DOJ investigation and Ameritox litigation also continued. After the Transaction's April 16, 2014 closing, both took a material turn.

On June 16, 2014, a jury in the United States District Court for the Middle District of Florida determined that Millennium had violated federal anti-kickback statutes and awarded Ameritox $2.755 million in compensatory damages and $12 million in punitive damages.[36] The United States Court of Appeals for the Eleventh Circuit later vacated the verdict.[37]

In December 2014, the DOJ informed Millennium that it would intervene in *qui tam* litigation involving Millennium's billing practices. It did so on March 19, 2015. On May 22, 2015, Millennium announced that it had reached a preliminary $256 million global settlement with the government related to the *qui tam* litigation. On October

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affiliate of a Lender or (c) an entity or an affiliate of an entity that administers or manages a Lender." *Id.* It defines "Person" as "an individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity of whatever nature." *Id.* at 472. The "Disqualified Lender[s]" are specific entities listed on a schedule attached to the Credit Agreement. *Id.* at 456.

[35] *Id.* at 51. The complaint alleges that "JP Morgan assigned a 'High Yield Research' Analyst" to monitor the secondary trading market and "to help disseminate non-confidential information about [Millennium]" to potential secondary-market purchasers of the Notes. *Id.* at 55.

[36] The United States District Court for the Middle District of Florida later lowered the punitive damages to $8.5 million. *See* J.A. 56.

[37] *See Ameritox, Ltd. v. Millennium Lab'ys, Inc.*, 803 F.3d 518, 541 (11th Cir. 2015).

16, 2015, Millennium completed the $256 million settlement. Soon thereafter, on November 10, 2015, Millennium filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

H. This Litigation

As part of the Chapter 11 bankruptcy proceedings, plaintiff was appointed trustee of the Millennium Lender Claim Trust (the "Trust"). The ultimate beneficiaries of the Trust are lenders who purchased Notes and have claims in the bankruptcy proceedings.

On August 1, 2017, plaintiff filed suit in the Supreme Court of the State of New York, New York County. He brought claims for violations of state securities laws, negligent misrepresentation, breach of fiduciary duty, breach of contract, and breach of the implied contractual duty of good faith and fair dealing.

On August 21, 2017, defendants filed a notice of removal to the United States District Court for the Southern District of New York pursuant to the Edge Act, 12 U.S.C. §632. Plaintiff filed a motion to remand the cause to New York state court. On September 24, 2018, the District Court denied plaintiff's motion to remand after concluding that it had jurisdiction under the Edge Act.

On June 28, 2019, defendants moved to dismiss plaintiff's complaint. On May 22, 2020, the District Court granted defendants' motion to dismiss. It dismissed the state-law securities claims because it concluded that plaintiff failed to plead facts plausibly suggesting that the Notes are "securities" under *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

On July 31, 2020, plaintiff moved for leave to file a proposed amended complaint. On December 1, 2020,

Magistrate Judge Sarah L. Cave issued a "Report and Recommendation" that recommended denying plaintiff's motion to amend the complaint as futile.

On September 30, 2021, the District Court adopted the Report and Recommendation and denied plaintiff's motion to amend the complaint as futile. Plaintiff timely appealed on October 28, 2021.

II. DISCUSSION

We consider at the threshold whether the District Court had subject matter jurisdiction over this action pursuant to the Edge Act, 12 U.S.C. §632. We hold that it did. We then turn to whether plaintiff plausibly suggested that the Notes are "securities" under *Reves v. Ernst & Young*, 494 U.S. 56 (1990). We hold that he did not.

A. Edge Act Jurisdiction

Plaintiff challenges the District Court's determination that it had jurisdiction over this matter pursuant to the Edge Act, 12 U.S.C. §632. We "review questions of subject matter jurisdiction de novo."[38]

Congress enacted the Edge Act in 1919 "to provide for the establishment of international banking and financial corporations operating under Federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad."[39] Consistent with that purpose, the Edge Act "authorized the creation of banking corporations chartered by the Federal Reserve Bank, so-called 'Edge Act banks' or 'Edge Act corporations,' which could

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[38] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 124 (2d Cir. 2010).

[39] 12 U.S.C. §611a.

engage in offshore banking operations freed from regulatory barriers imposed by state banking commissioners."[40]

Congress amended the statute in 1933 to "provid[e] for federal court jurisdiction of certain suits to which . . . Edge Act banks [or corporations] were parties."[41] For a federal court to have jurisdiction under the Edge Act, (1) the suit must be "of a civil nature at common law or in equity," (2) at least one party to the suit must be an Edge Act bank or corporation, and (3) the suit must "aris[e] out of transactions involving" (a) "international or foreign banking," (b) "banking in a dependency or insular possession of the United States," or (c) "out of other inter-

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[40] *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 779 (2d Cir. 2013); *see* 12 U.S.C. §611 (authorizing the formation of "[c]orporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United states, either directly or through the agency, ownership or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this subchapter and to act when required by the Secretary of the Treasury as fiscal agents of the United States").

[41] *Am. Int'l Grp.*, 712 F.3d at 779. Section 632 was added as part of the Banking Act of 1933, also known as the Glass-Steagall Act. See Banking Act of 1933, Pub. L. 73-66, §15, 48 Stat. 162, 184. As relevant, §632 provides that

> all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits.

national or foreign financial operations."[42] We have clarified that to satisfy the third element, the party Edge Act bank or corporation must *itself* engage in the relevant "international or foreign banking," "banking in a dependency or insular possession of the United States," or "international or foreign financial operations."[43]

The parties agree that the first two elements are satisfied: They agree that the suit is civil in nature and that a party to this suit—JP Morgan Chase—is an Edge Act bank.[44] The parties disagree on whether the third element is satisfied. Specifically, they dispute whether JP Morgan Chase *itself* engaged in the relevant international or foreign banking.

We conclude that the third element is satisfied because JP Morgan Chase *itself* engaged in international or foreign banking as part of the Transaction. To effectuate the Transaction, JP Morgan Chase assigned its interest in the Term Loan to lenders.[45] That assignment constituted *banking*.[46] And JP Morgan Chase's assignment of its in-

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[42] 12 U.S.C. §632.

[43] *Am. Int'l Grp.*, 712 F.3d at 784 ("[Section] 632 provides that in order for its grant of federal jurisdiction and removability to apply, the suit must have a federally chartered corporation [*i.e.*, an Edge Act bank or corporation] as a party, and the suit must arise out of an offshore banking or financial transaction of that federally chartered corporation.").

[44] Citibank is also an Edge Act bank, but defendants "rely on [JP Morgan Chase's] transactions to establish Edge Act jurisdiction." Defs. Br. at 23 n.3.

[45] *See, e.g.,* J.A. 432-35 (Assignment and Assumption Agreement between JP Morgan Chase and Brigade Credit).

[46] *See* 12 U.S.C. §24 (authorizing banks "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt . . . and by obtaining,

terest in the Term Loan "involv[ed] *international* or *foreign banking*"[47] because JP Morgan Chase directly assigned a portion of its interest in the Term Loan to *foreign* lenders.[48]

Plaintiff does not contest that JP Morgan Chase assigned portions of the Term Loan to foreign lenders. Rather, he argues that the mere "fortuitous involvement" of the foreign lenders "in an otherwise domestic transaction is alone insufficient to trigger the [international or foreign banking] element."[49] The "involvement" of the foreign lenders, he explains, was "fortuitous" because JP Morgan Chase "was [not] involved in soliciting" the foreign lenders "into the [T]ransaction."[50] Plaintiff thus concludes that Edge Act jurisdiction is wanting.

We are unpersuaded by his argument. True, JP Morgan Chase did not solicit the foreign lenders into the

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issuing, and circulating notes"); *see also* Off. of the Comptroller of the Currency, Loan Participations, 1998 WL 161494, at *1 (Apr. 1998) ("The purchase and sale of loans and participations in loans are established banking practices.").

[47] 12 U.S.C. § 632 (emphasis added).

[48] *See, e.g.*, J.A. 432 (Assignment and Assumption Agreement between JP Morgan Chase and Brigade Credit, a foreign entity); *id.* at 343 (Decl. of Lyndon M. Tretter stating that two of the Parent Lenders are foreign entities); *id.* at 344 (listing foreign Child Lenders that received a sub-allocation of the Term Loan from Brigade); *see also Wilson v. Dantas*, 746 F.3d 530, 535 (2d Cir. 2014) (holding that an Edge Act bank engaged in "international or foreign financial operations" where it "contributed $750 million in return for stock in the [Brazilian] portfolio companies"*); Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 792-93 (2d Cir. 1980) (holding that an Edge Act bank engaged in "international or foreign" banking when it provided a letter of credit for the benefit of a New York corporation on a Venezuelan corporation's account).

[49] Pl. Br. at 21.

[50] *Id.* at 21, 23.

Transaction. But that solicitation is not the relevant "international or foreign banking."[51] Rather, the relevant "international or foreign banking"[52] was JP Morgan Chase's direct assignment of portions of the Term Loan to foreign entities. JP Morgan Chase's deliberate choice to directly assign its interests in the Term Loan was also not "fortuitous," meaning "accidental" or "[o]ccurring by chance."[53] Plaintiff does not allege, for example, that JP Morgan Chase *accidentally* assigned its interest in the Term Loan to foreign entities.

In sum, an Edge Act bank's direct assignment of a loan to a foreign entity qualifies as "international or foreign banking."[54] Accordingly, because each of the elements required to establish Edge Act jurisdiction is satisfied, the District Court correctly concluded that it had jurisdiction over this matter.

B. Whether The Notes Are "Securities"

We now turn to the second issue presented: whether the District Court erroneously dismissed plaintiff's state-law securities claims because he did not plausibly allege that the Notes are "securities" under *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

We review a district court's decision to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*.[55] "In assessing the complaint, we accept all factual allega-

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[51] 12 U.S.C. §632.

[52] *Id.*

[53] *Fortuitous*, Black's Law Dictionary (11th ed. 2019); *see* Bryan A. Garner, *Garner's Modern English Usage* 409 (4th ed. 2016) ("[T]he word [fortuitous] is commonly misused for *fortunate*, in itself a very unfortunate thing.").

[54] 12 U.S.C. §632.

[55] *Kinsey v. N.Y. Times Co.*, 991 F.3d 171, 175 (2d Cir. 2021).

tions as true, and draw all reasonable inferences in the plaintiff's favor."[56] But "conclusory allegations are not entitled to the assumption of truth, and a complaint will not survive a motion to dismiss unless it contains sufficient factual matter, accepted as true, to state a claim that is plausible on its face."[57]

The parties agree that to determine whether the Notes are "securities," we should apply the test enunciated by the Supreme Court in *Reves*.[58] There, the Supreme Court explained that although the Act defines "security" to include "any note,"[59] the "phrase 'any note' should not

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[56] *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 72 (2d Cir. 2021) (en banc) (internal quotation marks and citation omitted).

[57] *Id.* at 72 (internal quotation marks, citation, and brackets omitted). Plaintiff asserts that because determining whether a note is a "security" is "fact-intensive," it is "not appropriately resolved on a motion to dismiss." Pl. Br. at 30 (quoting *SEC v. Rorech*, 673 F. Supp. 2d 217, 225 (S.D.N.Y. 2009)). That a claim is fact-intensive does not preclude dismissal under Rule 12(b)(6) if the plaintiff fails to allege facts plausibly supporting a claim upon which relief can be granted. *Cf. Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 195 n.6 (2016) ("We reject [plaintiff's] assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment.").

[58] The *Reves* test is used to determine whether notes are "securities" under both the Securities and Exchange Act of 1934 (the "1934 Act") and the Securities Act of 1933 (the "1933 Act"). *See* 494 U.S. at 60 (determining whether a note is a "security" under the 1934 Act); *Banco Espanol de Credito v. Sec. Pac. Nat'l Bank*, 973 F.2d 51, 55-56 (2d Cir. 1992) (applying the *Reves* test to claims brought under the 1933 Act). Plaintiff did not bring claims under either of those statutes. Instead, he brought claims under the state-securities laws of California, Massachusetts, Colorado, and Illinois. We, like the District Court, "accept[ ] [p]laintiff's assertion that *Reves* applies to [his] claims under California, Colorado, Illinois, and Massachusetts law." Special App'x 40. We accordingly proceed to examine the Notes under *Reves*.

[59] 15 U.S.C. § 78c(a)(10). The 1934 Act defines "security" in full as:

be interpreted to mean literally 'any note.'"[60] It reasoned that Congress's goal in enacting the Securities Act of 1933 and the 1934 Act (together, the "Securities Acts") was to regulate the investment market and not to provide a "broad federal remedy for all fraud."[61] Accordingly, only "notes issued in an investment context" are "securities."[62] By contrast, notes "issued in a commercial or consumer context" are not.[63]

Under *Reves*, courts must apply a "family resemblance" test to determine whether a "note" is a "security."

> any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Id. The 1934 Act's "definition of security . . . is virtually identical" to the 1933 Act's definition of "security." *Tcherepnin v. Knight*, 389 U.S. 332, 342 (1967).

[60] *Reves*, 494 U.S. at 63.

[61] *Id.* at 61 (internal quotation marks and citation omitted).

[62] *Id.* at 63.

[63] *Id.*

The test "begin[s] with a presumption that every note is a security."[64] It then directs courts to examine four factors, each of which helps to uncover whether the note was issued in an investment context (and is thus a security) or in a consumer or commercial context (and is thus not a security).[65] The four factors are:

1) "[T]he motivations that would prompt a reasonable seller and buyer to enter into" the transaction[66];
2) "[T]he plan of distribution of the instrument"[67];
3) "[T]he reasonable expectations of the investing public"[68]; and
4) "[W]hether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary."[69]

In balancing the four factors, courts compare the note at issue to an existing "judicially crafted" list of instruments that are not securities.[70] If "the note bears a strong

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[64] *Id.* at 65.

[65] *See id.* at 68-69 ("We have consistently identified the fundamental essence of a 'security' to be its character as an 'investment.' ").

[66] *Id.* at 66.

[67] *Id.* (internal quotation marks and citation omitted).

[68] *Id.*

[69] *Id.* at 67.

[70] *Id.* at 64; *see id.* at 67. At the time *Reves* was decided, that list included "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a 'character' loan to a bank customer, short-term notes secured by an assignment of accounts receivable, . . . a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized)[,] . . . [and] notes evidencing loans by commercial banks for current opera-

resemblance" to one of the instruments on that list, then we conclude that the note is not a security.[71] That a note does not bear a strong resemblance to an item on the list is not dispositive. The test allows courts to expand the list of non-security instruments to include the type of note at issue if, based on the four factors, a court concludes that the note is not a security.[72]

1. *The Motivations of the Parties*

The first *Reves* factor requires us to "examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it."[73] We must determine "whether the motivations [of the seller and buyer] are investment (suggesting a security) or commercial or consumer (suggesting a non-security)."[74] A buyer's motivation is investment if it expects to profit from its investment, including through earning either variable or fixed-rate interest.[75] A seller's motivation is

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tions." *Id.* at 65 (internal quotation marks and citation omitted); *see also Banco Espanol*, 973 F.2d at 56 (identifying "loans issued by banks for commercial purposes" as one of "the enumerated categor[ies]" of instruments that are not securities).

[71] *Id.* at 67.

[72] *See id.* ("If an instrument is not sufficiently similar to an item on the list, the decision whether another category should be added is to be made by examining the same factors.").

[73] *Id.* at 66.

[74] *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808, 812 (2d Cir. 1994).

[75] *See Reves*, 494 U.S. at 68 n.4 ("We emphasize that by 'profit' in the context of notes, we mean 'a valuable return on an investment,' which undoubtedly includes interest."); *Pollack*, 27 F.3d at 813 (observing that it was "not . . . a close question" that the buyers of bonds had an investment motivation where they would earn "a fixed rate of return in the form of interest" on the bonds).

Defendants assert that "[a]lthough the fixed rate of return on the loan does not by itself preclude the existence of a security, it is highly relevant that the lenders' return was not tied to Millennium's market

investment if its "purpose is to raise money for the general use of a business enterprise or to finance substantial investments."[76] A seller's motivation is commercial if, for example, "the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose."[77]

On the one hand, the pleaded facts plausibly suggest that the lenders' motivation was investment because the lenders expected to profit from their purchase of the Notes. Under the Credit Agreement, the lenders were entitled to receive quarterly interest payments over the course of seven years. They therefore expected to receive a "valuable return"[78] on their purchase of the Notes.

On the other hand, the pleaded facts do not plausibly suggest that *Millennium's* motivation was investment. Millennium was not using the Term Loan to raise funds for its urine testing business or to finance other investments. Instead, it planned to use the Term Loan to pay the outstanding amount due under the 2012 Credit Agreement,

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performance." Defs. Br. at 40 (citation omitted). To the contrary, that a lender's return is not tied to market performance is *not* highly relevant to whether a "note" is a "security" under *Reves*. The Supreme Court in *Reves* explicitly rejected a definition of "profit" that would "suggest that notes paying a rate of interest not keyed to the earning of the enterprise are not 'notes' within the meaning of the Securities Acts." *Reves*, 494 U.S. at 68 n.4. Instead, the Supreme Court "emphasize[d]" that, in "the context of notes," profit means "a valuable return on an investment." *Id.* A fixed rate of return is undoubtedly "a valuable return on an investment." *Id.*

[76] *Reves*, 494 U.S. at 66; *id.* at 67-68 (concluding that a seller's motivation was investment where it "sold the notes in an effort to raise capital for its general business operations").

[77] *Id.* at 66.

[78] *Id.* at 68 n.4.

make a shareholder distribution, "redeem outstanding warrants, debentures and stock options," and pay fees and expenses related to the Transaction.[79] These uses suggest that Millennium's motivation was commercial.

Accordingly, the pleaded facts indicate that the parties' motivations were mixed.[80] At this early stage of litigation, our application of the first *Reves* factor tilts in favor of concluding that the complaint plausibly alleges that the Notes are securities.

2. *The Plan of Distribution*

The second *Reves* factor requires us to "examine the plan of distribution of the instrument to determine whether it is an instrument in which there is common trading for speculation or investment."[81] This factor weighs in favor of determining that a note is a security if it is "offered and sold to a broad segment of the public."[82] This factor weighs against determining that a note is a security if there are limitations in place that "work[ ] to prevent the [notes] from being sold to the general public."[83]

The pleaded facts do not plausibly suggest that the Notes were "offered and sold to a broad segment of the public."[84] The Lead Arrangers offered the Notes *only* to

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[79] 79 J.A. 582.

[80] Plaintiff does not argue that Millennium's motivation was investment. He argues only that Millennium's motivation was not commercial because there was "no commercial purpose in assuming [the] additional $1.4 billion of debt." Pl. Br. at 34. The upshot of plaintiff's argument is that Millennium's motivations were neither investment nor commercial. The *Reves* test, however, requires us to categorize Millennium's motivation as either investment or commercial.

[81] *Reves*, 494 U.S. at 66 (internal quotation marks and citations omitted).

[82] *Id.* at 68.

[83] *Banco Espanol*, 973 F.2d at 55.

[84] *Reves*, 494 U.S. at 68.

sophisticated institutional entities, providing them with a Confidential Information Memorandum. JP Morgan then proceeded to allocate the Notes to *only* the sophisticated institutional entities that submitted "legally binding offer[s]."[85] This allocation process was not a "broad-based, unrestricted sale[ ] to the general investing public."[86]

Plaintiff points to the presence of a secondary market as evidence that the Notes were "offered and sold to a broad segment of the public."[87] But the restrictions on any assignment of the Notes rendered them unavailable to the general public. The Notes could not be assigned to a "natural person."[88] Nor could they be assigned without prior written consent from *both* Millennium *and* JP Morgan Chase, acting in its capacity as Administrative Agent, unless an assignment was being made to a "Lender, an affiliate of a Lender or an approved fund."[89] Nor could any assignment total more than $1,000,000, unless it was to a "Lender, an affiliate of a Lender, or an Approved Fund or an assignment of the entire remaining amount of the assigning Lenders[']" allocation.[90]

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[85] J.A. 50.

[86] *Pollack*, 27 F.3d at 814.

[87] *Reves*, 494 U.S. at 68.

[88] J.A. 546.

[89] *Id.* at 546-47.

[90] *Id.* at 547. Plaintiff challenges the stringency of these restrictions by noting that Millennium "shall be deemed to have consented" to a requested assignment if it does not object "within five Business Days after having received telecopy or electronic written notice thereof." *Id.* at 546; *see* Reply Br. at 20-21. The fact remains, however, that Millennium's consent was required in one form or another.

The assignment restrictions here are akin[91] to those in *Banco Espanol de Credito v. Security Pacific National Bank* that we held weighed against concluding that the relevant loan participations were securities.[92] In *Banco Espanol*, "[t]he plan of distribution specifically prohibited resales of the loan participations without the express written permission of [the issuer][,] . . . [which] worked to prevent the loan participations from being sold to the general public, thus limiting eligible buyers to those with the capacity to acquire information about the debtor."[93] The collective impact of the assignment restrictions here likewise works to prevent the Notes from being sold to the general public.[94]

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[91] Moreover, the plan of distribution for the Notes is unlike those found to render notes broadly available. *See, e.g., Reves*, 494 U.S. at 68 (deciding that the second factor weighed in favor of the conclusion that the notes were securities because the issuer, an agricultural cooperative, "offered the notes over an extended period to its 23,000 members, as well as to nonmembers"); *Pollack*, 27 F.3d at 814 (concluding that "the broad-based, unrestricted sales to the general investing public alleged in the complaint support[ed] a finding that these instruments are within the scope of the federal securities laws").

[92] "A loan participation is a sharing or selling of ownership interests in a loan between two or more financial institutions." *FDIC Manual*, *supra* note 1, §3.2-41. In a typical loan participation, a single institution "originates the loan," and then "sells ownership interests to one or more participating banks." *Id.* A syndicated loan is different in that multiple institutions "participate jointly in the [loan] origination process." *Id.* §3.2-73.

[93] 973 F.2d at 55.

[94] Plaintiff objects that despite the similar restrictions on assignments, *Banco Espanol* is distinguishable because the loan participations there were "distributed to only 11 investors," whereas here the Notes "were distributed to more than 400 investors." Reply Br. at 12. Although the number of purchasers may be probative of whether the note is broadly available to the general public, in the circumstances presented here, the Notes' distribution to more than 400

Accordingly, this factor weighs against concluding that the complaint plausibly alleges that the Notes are securities.

3. *The Public's Reasonable Perceptions*

The third *Reves* factor requires us to "examine the reasonable expectations of the investing public."[95] We "consider [notes] to be 'securities' on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the [notes] are not 'securities' as used in that transaction."[96] If buyers were "given ample notice that the instruments were . . . loans and not investments in a business enterprise," it suggests that the instruments are not securities.[97]

The pleaded facts do not plausibly suggest that the lenders reasonably perceived the Notes as securities. Instead, we are persuaded that the sophisticated entities that purchased the Notes "were given ample notice that the [Notes] were . . . loans and not investments in a busi-

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lenders did not render them available "to a broad segment of the public." *Reves*, 494 U.S. at 68.

[95] *Reves*, 494 U.S. at 66.

[96] *Id.* Relying on this language, plaintiff asserts that the third *Reves* factor works "as a one-way ratchet" and that a "failure to satisfy it *does not* weigh against a finding that a[n] instrument is a security." Pl. Br. at 41 (first quoting *Stoiber v. SEC*, 161 F.3d 745, 751 (D.C. Cir. 1998), then quoting *Fox v. Dream Tr.*, 743 F. Supp. 2d 389, 400 (D.N.J. 2010)). We think plaintiff is incorrect. All that language from *Reves* means is that an instrument is a security if the public reasonably expects that the instrument is a security, even if the other three factors weigh *against* concluding that the instrument is a security. If the public does *not* reasonably expect that an instrument is a security, then the third *Reves* factor will be considered alongside the other *Reves* factors.

[97] *Banco Espanol*, 973 F.2d at 55.

ness enterprise."[98] Before purchasing the Notes, the lenders certified that they were "sophisticated and experienced in extending credit to entities similar to [Millennium]."[99] They also certified that they had "independently and without reliance upon any Agent or any Lender, and based on such documents and information as [they] ha[ve] deemed appropriate, made [their] own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of [Millennium] and made [their] own decision to make [their] Loans hereunder."[100] This certification is substantively identical to the certification made by the purchasers in *Banco Espanol*, which was central to our determination that the buyers there could not have reasonably perceived the loan participations as securities.[101]

Plaintiff argues that the fact that the loan documents at times refer to the buyers as "investors" plausibly suggests that the buyers reasonably expected that the Notes were securities.[102] We disagree. First, there are only isolated references to "investors" in the loan documents. These isolated references could not have plausibly created the reasonable expectation that the buyers were investing

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[98] *Id.*

[99] J.A. 566.

[100] *Id.* at 539.

[101] In *Banco Espanol*, "sophisticated purchasers" entered a "Master Participation Agreement" under which they "acknowledge[d] that [they] ha[d] independently and without reliance upon [the bank] and based upon such documents and information as the [sophisticated purchaser had] deemed appropriate, made [their] own credit analysis." 973 F.2d at 53, 55.

[102] *See* J.A. 561 (referring to "Public Side Investors"); *id.* at 572 (providing a "Public investors dial-in" number).

in securities.[103] Second, the loan documents more consistently refer to the buyers as "lenders." This label aligns with the reasonable expectations of the experienced entities that the Notes were not securities.

In sum, this factor weighs against concluding that the complaint plausibly alleges that the Notes are securities.[104]

4. *Whether some other risk-reducing factor renders application of securities laws unnecessary*

The fourth *Reves* factor requires us to "examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary."[105] Among the factors that reduce the risks associated with an instrument are whether the instru-

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[103] Likewise, under these circumstances, JP Morgan's assignment of a "High Yield Research Analyst" to track the secondary market could not plausibly have made the experienced lenders *reasonably* believe that they were investing in securities. *See id.* at 55.

[104] The District Court suggested that the third *Reves* factor weighed against finding that the Notes are securities because plaintiff "cited no case in which a court has held that a syndicated term loan is a 'security.'" Special App'x 47. That reasoning is circular. It would mean that no court could ever find that the reasonable expectations of the investing public are that a syndicated term loan is a security. As *Reves* instructs, in assessing whether a given note is a security, "we are not bound by legal formalisms, but instead take account of *the economics of the transaction under investigation*." 494 U.S. at 61 (emphasis added). It is possible that a court faced with a different transaction could find that the reasonable investing public perceived an instrument labelled a "syndicated term loan" to be a "security." *Cf. id.* ("Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called.").

[105] *Reves*, 494 U.S. at 67.

ment is secured by collateral or is insured[106] and whether "specific policy guidelines"[107] issued by federal regulators address the type of instrument at issue.

The pleaded facts do not plausibly suggest that application of securities laws[108] are necessary here for two reasons.[109] First, the Notes were "secured by a perfected first priority security interest in all of [Millennium's] tangible and intangible assets," *i.e.*, Millennium's collateral.[110] That perfected first priority security interest reduces the risk associated with the Notes. Second, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (jointly, the "Bank Regulators") issued "specific policy guidelines"[111] addressing syndicated

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[106] *See Reves*, 494 U.S. at 69 (finding "no risk-reducing factor to suggest that [the notes at issue] are not in fact securities," in part because they were "uncollateralized and uninsured"); *Pollack*, 27 F.3d at 814 (observing in connection with the analysis of the fourth *Reves* factor that the "amended complaint specifically alleges that the mortgage participations were 'not secured' and were 'uncollateralized' "). "Collateral" is "[p]roperty that is pledged as security against a debt." *Collateral*, Black's Law Dictionary (11th ed. 2019); *see FDIC Manual*, *supra* note 1, § 3.2-66 (describing the requirements for establishing a perfected security interest in collateral).

[107] *Banco Espanol*, 973 F.2d at 55.

[108] Plaintiff does not argue that our analysis of the fourth *Reves* factor is affected by the fact that he brought claims under state securities laws as opposed to the Securities Acts.

[109] *Reves*, 494 U.S. at 67.

[110] J.A. 382-83.

[111] *Banco Espanol*, 973 F.2d at 55 (concluding that the fourth *Reves* factor weighed against concluding that the loan participations were securities where "the Office of the Comptroller of the Currency has issued specific policy guidelines addressing the sale of loan participations").

term loans.[112]

Plaintiff contends that the Bank Regulators' guidance does not constitute "another regulatory scheme [that] significantly reduces the risk of the"[113] Notes "because the Bank Regulators' guidance merely addresses risk management controls to ensure sound banking practices and minimize risks to banks" and "does not address risks to investors."[114] Although it is true that the guidance aims to minimize risks to banks, in doing so it also aims to protect consumers. For example, the Bank Regulators have explained that the purpose of "supervisory guidance [is to] provide[ ] examples of practices that the [Bank Regulators] generally consider[ ] consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers."[115] Moreover, we already considered and rejected the argument raised by plaintiff here in *Banco Espanol*.[116] We

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[112] *See, e.g., Interagency Guidance on Leveraged Lending*, 78 Fed. Reg. 17766, 2013 WL 1154182 (Mar. 22, 2013); *Comptroller's Handbook*, *supra* note 12.

[113] *Reves*, 494 U.S. at 67.

[114] Pl. Br. at 45. Plaintiff does not argue that the issued guidance is ineffective in minimizing risks to banks.

[115] 12 C.F.R. §262, App. A (2021) (emphasis added); *see also id.* §4, Subpt. F, App. A (same); *id.* §302, App. A (same).

[116] *See* Brief of the SEC as Amicus Curiae at 40-41, *Banco Espanol de Credito v. Sec. Pac. Nat'l Bank*, 973 F.2d 51 (2d Cir. 1992), 1992 WL 12936369. In *Banco Espanol*, the Securities and Exchange Commission ("SEC") argued, as amicus curiae, that the "guidelines [issued by the Office of the Comptroller of the Currency] for national banks purchasing loan participations" were insufficient to render application of the Securities Acts unnecessary because they "addressed . . . steps *national banks* should take before they *purchase* loan participations" and had "no applicability" as to the "plaintiff purchasers" because "none are national banks." *Id.* at 37, 40-41.

were unpersuaded then, and plaintiff offers no compelling reason to revisit that decision now.[117]

Accordingly, this factor weighs against concluding that the complaint plausibly alleges that the Notes are securities.

* * *

To summarize our application of the *Reves* factors to the pleaded facts:

- The first factor—the motivations of the parties—weighs *in favor of* concluding that the complaint plausibly suggests that the Notes are securities because, although Millennium's motivation appears to be "commercial," the lenders' motivations were "investment."
- The second factor—the plan of distribution—weighs *against* concluding that the complaint plausibly suggests that the Notes are securities because they were unavailable to the general public by virtue of restrictions on assignments of the Notes.
- The third factor—the reasonable expectations of the public—weighs *against* concluding that the complaint plausibly suggests that the Notes are securities because the lenders were sophisticated and ex-

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[117] Nor does the SEC. Following argument in this case, we entered an order "solicit[ing] any views that the [SEC] may wish to share on th[e] issue" of whether the Notes are securities under *Reves*. Order, *Kirschner v. JP Morgan Chase Bank, N.A.*, No. 21-2726 (2d Cir. Mar. 16, 2023), ECF No. 170. After receiving several extensions of time to file its response to our invitation to provide its views on this question, the SEC notified the Court that "[d]espite diligent efforts to respond to the Court's order and provide the [SEC's] views, the staff is unfortunately not in a position to file a brief on behalf of the [SEC] in this matter." Letter on behalf of Amicus Curiae SEC, *Kirschner*, No. 21-2726 (2d Cir. July 18, 2023), ECF No. 207.

perienced institutional entities with ample notice that the Notes were not securities.

- The fourth factor—the existence of other risk-reducing factors—weighs *against* concluding that the complaint plausibly suggests that the Notes are securities because they were secured by collateral and federal regulators have issued specific policy guidance addressing syndicated loans.

Upon our review of the pleaded facts, we conclude that the Notes, like the loan participations in *Banco Espanol*, "bear[ ] a strong resemblance"[118] to one of the enumerated categories of notes that are not securities: "[L]oans issued by banks for commercial purposes."[119] We accordingly hold that plaintiff has failed to plead facts plausibly suggesting that the Notes are securities under *Reves v. Ernst & Young*, 494 U.S. 56 (1990). The District Court therefore properly dismissed plaintiff's state-law securities claims.

CONCLUSION

In sum, we hold as follows:

1) The District Court had jurisdiction over this action pursuant to the Edge Act because defendant-appellee JP Morgan Chase Bank, N.A. engaged in international or foreign banking as part of the Transaction; and

2) The District Court properly dismissed plaintiff's state-law securities claims because he failed to plead

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[118] *Reves*, 494 U.S. at 67.

[119] 973 F.2d at 55-56 ("[U]nder the *Reves* family resemblance analysis . . . we hold that the loan participations in the instant case are analogous to the enumerated category of loans issued by banks for commercial purposes and therefore do not satisfy the statutory definition of 'notes' which are 'securities.' ").

facts plausibly suggesting that the Notes are securities under the "family resemblance" test established by the Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

We accordingly **AFFIRM** the District Court's September 24, 2018 order determining that it had jurisdiction over this matter pursuant to the Edge Act and **AFFIRM** its May 22, 2020 order dismissing plaintiff's state-law securities claims.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 21-2726-cv

MARC S. KIRSCHNER, solely in his capacity as Trustee of The Millennium Lender Claim Trust,

Plaintiff-Appellant,

v.

JP MORGAN CHASE BANK, N.A., JP MORGAN SECURITIES LLC, CITIBANK, N.A., BANK OF MONTREAL, BMO CAPITAL MARKETS CORP., SUNTRUST ROBINSON HUMPHREY, INC., SUNTRUST BANK, CITIGROUP GLOBAL MARKETS, INC.,

Defendants-Appellees.*

Appeal from orders of the United States District Court for the Southern District of New York (Paul G. Gardephe, *Judge*).

SUMMARY ORDER

August 24, 2023

PRESENT: JOSÉ A. CABRANES, JOSEPH F. BIANCO, MYRNA PÉREZ, *Circuit Judges*.

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* The Clerk of Court is directed to amend the caption as set forth above.

FOR PLAINTIFF-APPELLANT: CHRISTOPHER P. JOHNSON (Kyle A. Lonergan, Joshua J. Newcomer, and Grant L. Johnson, *on the brief*), McKool Smith P.C., New York, NY.

FOR DEFENDANTS-APPELLEES JP MORGAN CHASE BANK, N.A. and JP MORGAN SECURITIES LLC: JEFFREY B. WALL (Christopher M. Viapiano, Zoe A. Jacoby, Ann-Elizabeth Ostrager, and Mark A. Popovsky, *on the brief*), Sullivan & Cromwell LLP, Washington, D.C. & New York, NY.

FOR DEFENDANTS-APPELLEES CITIBANK N.A. and CITIGROUP GLOBAL MARKETS INC.: Benjamin S. Kaminetzky, Lara Samet Buchwald, and Tina Hwa Joe, *on the brief*, Davis Polk & Wardwell LLP, New York, NY.

FOR DEFENDANTS-APPELLEES SUNTRUST ROBINSON HUMPHREY, INC., and SUNTRUST BANK: J. Emmett Murphy and John C. Toro, *on the brief*, King & Spalding LLP, New York, NY.

FOR DEFENDANTS-APPELLEES BMO CAPITAL MARKETS CORP. and BANK OF MONTREAL: Steve M. Dollar and Sean M. Topping, *on the brief*, Norton Rose Fulbright US LLP, New York, NY.

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the May 22, 2020 and September 30, 2021 orders of the District Court be and hereby are **AFFIRMED**.

In 2014, Defendants-Appellees facilitated a $1.775 billion syndicated term loan to Millennium Health LLC f/k/a Millennium Laboratories ("Millennium"). Plaintiff Appellant Marc S. Kirschner is the trustee of the Millennium Lender Claim Trust, the beneficiaries of which are

"approximately 70 institutional investor groups, comprised of roughly 400 mutual funds, hedge funds, and other institutional investors" who purchased debt obligations of Millennium as part of the syndicated loan transaction facilitated by defendants. Joint App'x ("J.A.") 17. Shortly after the transaction closed, Millennium filed for bankruptcy. Plaintiff thereafter brought a series of claims against defendants arising from their role in the syndicated loan transaction.

On appeal, plaintiff challenges the District Court's dismissal of his claims for violations of state securities laws, negligent misrepresentation, and breach of contract, as well as the District Court's denial of his motion for leave to amend the complaint.[1] Plaintiff also appeals the District Court's determination that it had subject-matter jurisdiction over the action pursuant to the Edge Act, 12 U.S.C. § 632. Plaintiff's appeal as it concerns the dismissal of his state-law securities claims and the District Court's determination that it had jurisdiction pursuant to the Edge Act is addressed in an opinion entered this same day.[2] We write separately here to address plaintiff's remaining claims on appeal. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review *de novo* a district court's grant of a motion to dismiss, accepting as true all factual allegations in the

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[1] Plaintiff originally pled two breach of contract claims: one involving alleged failures to satisfy "conditions precedent" and the other involving alleged failures to provide notice of default. Plaintiff appeals the dismissal of only his "conditions precedent" breach of contract claim. *See* Pl. Br. at 51-53.

[2] In that opinion, we affirm the District Court's determination that it had jurisdiction pursuant to the Edge Act and its dismissal of plaintiff's state-law securities claims.

complaint and drawing all reasonable inferences in favor of the plaintiffs." *Muto v. CBS Corp.*, 668 F.3d 53, 56 (2d Cir. 2012). "While ordinarily, we review denial of leave to amend under an 'abuse of discretion' standard, when the denial of leave to amend is based on a legal interpretation, such as a determination that amendment would be futile, a reviewing court conducts a *de novo* review." *Smith v. Hogan*, 794 F.3d 249, 253 (2d Cir. 2015) (emphasis added) (brackets and internal quotation marks and citation omitted).[3]

Having conducted a *de novo* review of the District Court's dismissal of plaintiff's negligent misrepresentation and breach of contract claims, we affirm those dismissals for substantially the reasons stated by the District Court. Likewise, having conducted a *de novo* review of the District Court's denial of plaintiff's motion for

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[3] The District Court referred plaintiff's motion for leave to amend the complaint to Magistrate Judge Sarah L. Cave. Magistrate Judge Cave issued a Report and Recommendation recommending "that [p]laintiff's [motion for leave to amend] be denied on grounds of futility." Sp. App'x at 67. The District Court adopted Magistrate Judge Cave's Report and Recommendation and accordingly denied plaintiff's motion for leave to amend the complaint as futile. Defendants assert that plaintiff failed to preserve at least some of his challenges to the District Court's ultimate denial of his motion for leave to amend because he made only "perfunctory objections" to the Report and Recommendation. Def. Br. at 62 (citing *Benitez v. Parmer*, 654 F App'x 502, 503-04 (2d Cir. 2016)). Defendants argue that for such challenges, we should conduct at most an "abbreviated review" of the underlying Report and Recommendation. *Id.* (quoting *Benitez*, 654 F. App'x at 504). Plaintiff asserts that we must conduct a *de novo* review. Pl. Br. at 17; *see also* Reply Br. at 25 n.26. We need not determine whether no review, "abbreviated review," or *de novo* review is the appropriate standard of review. We assume without deciding that *de novo* review is proper. Under that review, we agree with the District Court that plaintiff's motion to amend the complaint is futile.

leave to amend the complaint as futile, we affirm that denial for substantially the reasons stated by the District Court in its opinion adopting Magistrate Judge Cave's Report and Recommendation.

CONCLUSION

Having reviewed all of the arguments raised by plaintiff on appeal and finding them to be without merit, we **AFFIRM** the May 22, 2020 and September 30, 2021 orders of the District Court.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NO. 17 CIV. 6334 (PGG)

MARC S. KIRSCHNER, solely in his capacity as Trustee of The Millenium Lender Claim Trust,

Plaintiff,

v.

JPMORGAN CHASE BANK, N.A.; JPMORGAN SECURITIES LLC; CITIGROUP GLOBAL MARKETS INC.; CITIBANK, N.A.; BMO CAPITAL MARKETS CORP.; BANK OF MONTREAL; SUNTRUST ROBINSON HUMPHREY, INC.; AND SUNTRUST BANK,

Defendants.

MEMORANDUM OPINION AND ORDER

May 22, 2020

PAUL G. GARDEPHE, U.S.D.J.:

Plaintiff Marc S. Kirschner—in his capacity as trustee of the Millennium Lender Claim Trust (the "Trust")—brings this action against J.P. Morgan Chase Bank, N.A. ("Chase"), J.P. Morgan Securities LLC ("JPM Securities"), Citibank, N.A. ("Citibank"), Citigroup Global Markets, Inc. ("CitiGlobal"), Bank of Montreal, BMO Capital Markets Corp., SunTrust Bank, and SunTrust Robinson Humphrey, Inc. (collectively, "Defendants") alleging violations of various state securities laws; negligent misrepresentation;

breach of fiduciary duty; breach of contract; and breach of the implied covenant of good faith and fair dealing. (Cmplt. (Dkt. No. 1-1))

Plaintiff's claims arise out of a $1.775 billion syndicated loan transaction[1] that closed on April 16, 2014. (*Id.* ¶¶1, 96) In that transaction, Defendants sold to the Trust's beneficiaries—approximately seventy institutional investor groups, comprised of roughly 400 mutual funds, hedge funds, and other institutional investors (the "Investors")—debt obligations of Millennium Laboratories LLC ("Millennium")—a California-based urine drug testing company. (*Id.* ¶¶1, 94-95)

In November 2015—nineteen months after the transaction closed—Millennium filed a bankruptcy petition. (*Id.* ¶3) The bankruptcy plan issued by the Bankruptcy Court created the Trust, and provided it with the Investors' claims against Defendants. (*Id.* ¶8)

The Complaint alleges generally that "Defendants misrepresented or omitted . . . material facts in the offering materials they provided and communications they made to Investors regarding the legality of [Millennium's] sales, marketing, and billing practices," as well as "the known risks posed by a pending government investigation into the illegality of such practices." (*Id.* ¶1)

This action was filed on August 1, 2017, in Supreme Court of the State of New York, New York County. (*See id.*) On August 21, 2017, Defendants removed the case to

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[1] "A syndicated loan is a commercial credit provided by a group of lenders," and is "structured, arranged, and administered by one or several commercial or investment banks, known as arrangers." S&P Global Market Intelligence, *Syndicated Loans: The Market and the Mechanics* 1 (2017), https://www.lcdcomps.com/d/pdf/LCD%20Loan%20Primer.pdf.

this District, asserting the Edge Act, 12 U.S.C §632, as the basis for federal jurisdiction. (Notice of Removal (Dkt. No. 1)) On September 24, 2018, this Court denied Plaintiff's motion to remand. (Dkt. No. 38)

Defendants have moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. (Dkt. No. 76) For the reasons stated below, Defendants' motion will be granted.

BACKGROUND[2]

I. THE DEFENDANTS

Chase is a national banking association with its principal place of business in New York. (Cmplt. (Dkt. No. 1-1) ¶12) JPM Securities—a Chase affiliate—is a registered broker-dealer and investment advisor with its principal place of business in New York. (*Id.* ¶¶13-14)

Citibank is a national banking association with its principal place of business in New York. (*Id.* ¶16) Citi-Global—a Citibank affiliate—is a registered broker-dealer and investment advisor with its principal place of business in New York. (*Id.* ¶¶15-16)

Bank of Montreal is chartered under the Bank Act of Canada and is a public company incorporated in Canada. (*Id.* ¶18) BMO Capital Markets is a Bank of Montreal affiliate and is a registered broker-dealer with its principal place of business in New York. (*Id.* ¶17)

SunTrust Bank is chartered under Georgia law and offers banking and trust services and products. (*Id.* ¶20) SunTrust Robinson Humphrey is a wholly-owned subsid-

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[2] The following facts are drawn from the Complaint and are presumed true for purposes of resolving Defendants' motion to dismiss. *See Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007).

iary of SunTrust Bank and is a registered broker-dealer with its principal place of business in Georgia. (*Id.* ¶19)

II. Events Preceding The Syndicated Loan Transaction

Millennium was a San Diego-based private company that provided laboratory-based diagnostic testing of urine samples for physicians. (*Id.* ¶¶26-27) In March 2012, the U.S. Department of Justice ("DOJ") began investigating Millennium for federal healthcare law violations. (*Id.* ¶¶32-40)

In March 2012, Millennium was also engaged in litigation with a competitor, Ameritox Ltd. (*Id.* ¶39) Ameritox had sued Millennium in 2011 alleging violations of the Stark Law and the Anti-Kickback statute. (*Id.*) These federal statutes proscribe "certain forms of remuneration to or relationships with physicians who refer Medicare-billable work to other providers[,] such as drug testing labs." (*Id.* ¶35) Ameritox claimed that Millennium's violation of these statutes constituted "unfair competition." (*Id.* ¶39)

Also in March 2012, Chase, JPM Securities, SunTrust Bank, SunTrust Robinson Humphrey, and Bank of Montreal, among others, entered into a credit agreement with Millennium that provided it with a $310 million term loan and a $20 million revolving credit facility (the "2012 Credit Agreement"). (*Id.* ¶¶31-32) As DOJ's investigation of Millennium continued over the next two years, Chase and JPM Securities "carefully monitored the progress of the [] investigation" and began "exploring . . . ways to refinance the 2012 Credit Agreement" to escape their "term loan exposure to Millennium." (*Id.* ¶¶41, 45, 69)

"[B]y the end of February 2014," however, "the only financing option left on the table" was "a huge institutional

financing"—totaling $1.775 billion—that "would take out the $304 million principal balance still owed to [Millennium]'s bank lenders" under the 2012 Credit Agreement. (*Id.* ¶¶49, 69) This institutional financing would also provide "an extraordinary dividend and bonuses" to Millennium's directors, officers, and controlling shareholders (the "Insiders"), totaling "just shy of $1.27 billion." (*Id.* ¶¶30, 49, 69) The remaining $196 million would be used to retire debentures held by a private equity investor, leaving Millennium with $1.775 billion in debt and none of the proceeds. (*Id.* ¶¶49, 69)

In a commitment letter dated March 16, 2014 (the "2014 Commitment Letter"), Chase, Citibank, Bank of Montreal, and SunTrust Bank agreed that they—or, in Citibank's case, CitiGlobal or one its affiliates—would fund the $1.775 billion financing through a term loan as "Initial Lenders." (*Id.* ¶66) Defendants also agreed that the four broker-dealer Defendants—JPM Securities, CitiGlobal, BMO Capital, and SunTrust Robinson Humphrey—would serve as "Arrangers" for the debt financing. (*See id.* ¶¶13, 15, 17, 19, 66)

The 2014 Commitment Letter designates JPM Securities and CitiGlobal as the "Lead Arrangers," and BMO Capital and SunTrust Robinson Humphrey as the "Co-Managers" of the loan facility. (*Id.* ¶¶66-67) The 2014 Commitment Letter also authorizes Defendants to "'syndicate' th[e] initial loan amount to a group of institutional lenders managed by the 'Lead Arrangers.'" (*Id.* ¶¶66, 92) According to the "Working Group List" prepared by JPM Securities, all of Defendants' employees working on the Millennium financing were located in the United States. (*See* Tretter Decl., Ex. A (Working Group List) (Dkt. No. 26-3))

III. Mechanics Of The Syndicated Loan Transaction

The syndicated loan transaction that closed on April 16, 2014, "proceeded in three inter-related and contemporaneous steps." (Cmplt. (Dkt. No. 1-1) ¶¶95-96) First, the Arrangers agreed among themselves that JPM Securities or its affiliate, Chase, would—"as an accommodation" to the other Arrangers—"perform the entire initial funding[,] and that the other Defendants would have to contribute only if some of the Investors failed in their obligations to buy the [portion of the term loan] for which they had committed." (*Id.* ¶95) Second, Chase and Millennium entered into a "Master Consent to Assignment," in which Millennium agreed to sell portions of the term loan to the Investors up to the amounts listed in an attached schedule. (*Id.*) Third, effective no later than the time that Chase funded Millennium, "each individual Investor . . . as 'Buyer' became irrevocably committed to [Chase] as 'Seller' to purchase . . . the amount [of the term loan] it had subscribed for and been allocated." (*Id.*)

After these three steps, "[t]he actual sale between [Chase] and each Investor was later documented through a formal Assignment and Assumption agreement," in which "[e]ach Investor succeeded to the rights of [Chase] under, and [ ] became a party to, [a] Credit Agreement between and among all Investors, Millennium, ML Holdings II [an intermediate holding company formed to hold Millennium's stock], and [Chase] as Administrative Agent." (*Id.*; *see also id.* ¶24)

IV. The Syndicated Loan Transaction is Effectuated

"[O]n or before 5 p.m. (Eastern) on April 14, 2014," "Defendants required the Investors or their investment advisors to make a final legally binding offer to purchase" a portion of the term loan "'with [their] [Arranger] sales-

person.'" (*Id.* ¶93 (last alteration in original)) The next day, April 15, 2014, the Arrangers informed the Investors or their investment advisors of the gross allocation that each had been awarded. (*Id.*)

Investment advisors that managed mutual and other funds considering an investment in the term loan then had the right to inform the Arrangers of the sub-allocations they wished to make to particular investors in their own funds. (*Id.* ¶94) For example, an investment advisor with discretionary authority over multiple funds might make an offer to purchase $50 million in Millennium notes, receive a gross allocation of $45 million, and then subdivide that $45 million among a group of investors. (*Id.*) Defendants referred to the investors that received initial allocations as "Parent Investors," and investors that received the sub-allocations as "Child Investors." (Tretter Decl. (Dkt. No. 26-2) ¶7)

On April 16, 2014, Chase obtained consent from Millennium to allocate the entirety of the $1.798 billion debt financing—the $1.775 billion "fronted" by Chase, plus a small potential over-allotment—to sixty-one Parent Investors. (Trotter Decl., Ex. D (Master Consent to Assignment) (Dkt. No. 26-6)) Of the sixty-one Parent Investors, fifty-nine are domestic entities—which were allocated 98.52% of the term loan—and two are foreign domiciliaries that were allocated 1.48% of the term loan. (*Id.*; Tretter Decl. (Dkt. No. 26-2) ¶8) Of the Child Investors, more than two hundred are foreign domiciliaries. (*See* Notice of Removal, Ex. C (Lender Schedule) (Dkt. No. 1-3)) All the Child Investors are legal entities or funds. (*Id.*)

On April 16, 2014—the day that the transaction closed—Chase made the initial term loan of $1.775 billion to Millennium, which triggered the commitments of the

Investors to purchase the entire amount from Chase through the assigned allocations. Plaintiff has submitted exhibits demonstrating how Chase effected these sales. (*See* Pltf. Remand Br. (Dkt. No. 26-1) at 12 n.2; Def. Remand Opp. Br (Dkt. No. 27) at 12)[3]

For example, on April 15, 2014, JPM Securities sent an email to a domestic Parent Investor, Brigade Capital, informing Brigade Capital that it had been allocated $45 million in Millennium notes, and directing that "[s]ub-allocations" were "to be returned via ClearPar"—a U.S. based clearing house—"and funded within no less than 3 and no more than 10 days after funding." (*See* Tretter Decl., Ex. F (April 15, 2014 Brigade Capital email) (Dkt. No. 26-8) at 2) A corresponding ClearPar "Trade Ticket" dated April 25, 2014 indicates that Brigade Capital had sub-allocated that $45 million among twenty-three Child Investors (Tretter Decl., Ex. G (ClearPar Trade Ticket) (Dkt. No. 26-9) at 2-3), ten of which are foreign domiciliaries. (Tretter Decl. (Dkt. No. 26-2) ¶10)

The Institutional Allocation Confirmation, and the Assignment and Assumption Agreement—both executed by Chase and Brigade Credit Fund II, Ltd., one of the foreign Child Investors (*id.* ¶11)—are examples of the transaction documents entered into by Chase and the Child Investors. (*See* Pltf. Remand Br. (Dkt. No. 26-1) at 12 n.2; Def. Remand Opp. Br. (Dkt. No. 27) at 12) In the Institutional Allocation Confirmation, Brigade Credit Fund II confirms its agreement to assume from Chase the obligation to purchase more than $11 million of the term loan "within ten (10) business days of the Funding, or within such other period agreed to by [Chase], by as-

[3] All references to page numbers in this Order are as reflected in this District's Electronic Case Files ("ECF") system.

signment pursuant to the Assignment and Assumption [Agreement]." (Tretter Decl., Ex. H (Brigade Credit Fund II Institutional Allocation Confirmation) (Dkt. No. 26-10) at 2) In the Assignment and Assumption Agreement—which, as contemplated in the Institutional Allocation Confirmation, was executed on April 15, 2014—Chase irrevocably sold and assigned the agreed-upon portion of the term loan. (Tretter Decl., Ex. I (Brigade Credit Fund II Assignment and Assumption) (Dkt. No. 26-11)) Once Brigade Credit Fund II and Chase executed the Assignment and Assumption Agreement, Brigade Credit Fund II became a party to the credit agreement governing the term loan (the "2014 Credit Agreement"). (*Id.* at 2)

V. Millenium's Decline And Subsequent Bankruptcy

On June 16, 2014, two months after the April 16, 2014 closing, a jury in the Ameritox litigation returned a verdict in favor of Ameritox, finding in special interrogatories that Millennium had violated both the Stark Law and the Anti-Kickback statute. (*Id.* ¶110) The jury awarded Ameritox $2.755 million in compensatory damages and $12 million in punitive damages—later remitted to $8.5 million—based on Millennium's misconduct in Florida, Tennessee, and Texas. (*Id.* ¶111) On the day of the jury's verdict, Chase and JPM Securities concluded that it would have a $500 million negative impact on Millennium's valuation. (*Id.* ¶114)

In December 2014—six months later—DOJ notified Millennium that it intended to intervene in civil False Claims Act proceedings brought by *qui tam* relators based on Millennium's alleged federal healthcare law violations. (*Id.* ¶118) Two months later, in February 2015, the Centers for Medicare and Medicaid Services threatened

to debar Millennium based on allegations of illegal billing practices. (*Id.* ¶119) In March 2015, the DOJ formally intervened in the *qui tam* proceedings. (*Id.* ¶120)

In May 2015, Millennium disclosed that it had agreed in principle to a $256 million global settlement with DOJ. (*Id.* ¶3) Millennium finalized that settlement on October 16, 2015, and on November 10, 2015, Millennium defaulted on the term loan and filed a bankruptcy petition. (*Id.*) The Bankruptcy Court issued a bankruptcy plan that established the Trust, and Plaintiff was appointed as Trustee. (*Id.* ¶11)

VI. PLAINTIFF'S CLAIMS

The Complaint was filed in Supreme Court of the State of New York, New York County, on August 1, 2017, and asserts eleven causes of action. Causes of Action One through Six arise under the securities laws of California, Massachusetts, Colorado, and Illinois, and allege that Defendants made actionable misstatements and omissions to the Investors. (*See id.* ¶¶125-172) The Seventh Cause of Action alleges negligent misrepresentation as to all Defendants. (*Id.* ¶¶173-181) Causes of Action Eight through Eleven are asserted only against Chase, and allege breach of fiduciary duty, breach of contract, breach of post-closing contractual duties, and breach of the implied covenant of good faith and fair dealing. (*Id.* ¶¶182-207)

The Complaint alleges that all Defendants are liable for negligent misrepresentation and securities law violations because, *inter alia*, "Defendants abandoned their obligations" to perform due diligence concerning (1) Millennium's exposure to liability, damages, and penalties in connection with the DOJ investigation; and (2) the artificial inflation of Millennium's financial results stemming from the company's unlawful sales and marketing practices. (*Id.* ¶¶53-65) The Complaint also alleges that JPM

Securities and CitiGlobal created offering materials that contained material misstatements and omissions that were designed to, and did, induce the Investors' purchases of the Millennium notes. (*Id.* ¶¶70-91)

Causes of Action Eight through Eleven arise, in part, from the 2014 Credit Agreement, which includes as a condition precedent for the $1.775 billion loan that Millennium not be in breach of the representations and warranties in the 2014 Credit Agreement. (*Id.* ¶¶100-03) According to the Complaint, Chase knew or should have known that the representations and warranties in the 2014 Credit Agreement falsely assured Investors that Millennium had no exposure to material litigation and was in material compliance with all applicable regulations and laws, and that, therefore, the conditions precedent to funding had not been satisfied. (*Id.* ¶¶101-05) The Complaint further alleges that Chase "breached its contractual duties, express and implied, and fiduciary duties as agent to the Investors by (i) failing to give the Investors notice [that the conditions precedent had not been satisfied]; and (ii) proceeding with the funding of Millennium." (*Id.* ¶105)

These claims against Chase extend to the period after Chase assigned the entirety of the term loan to the Investors, because Chase remained a party to the 2014 Credit Agreement as Administrative Agent. (*Id.* ¶95) In that role, Chase was obligated to provide Investors with (1) information from and about Millennium "contemporaneously with intervening material developments" (*id.* ¶107); and (2) notice of, *inter alia*, (a) any "investigation or proceeding that may exist at any time between [Millennium] and any Governmental Authority, that if adversely determined would reasonably be expected to have a Material Adverse Effect"; and (b) "any litigation or proceeding . . . in which the amount involved is $15,000,000 or more and not fully

covered by insurance." (*Id.* ¶109 (internal quotation marks and citations omitted)) Notwithstanding these obligations, Chase allegedly did not provide contemporaneous notice of the verdict in the Ameritox litigation (*id.* ¶115), even though Chase viewed the verdict as having a material effect on the company's valuation. (*Id.* ¶114) Plaintiff contends that "[i]nterest on the original . . . judgment would easily put the amount involved at over the $15 million figure . . . and it is doubtful that any of the punitive damages would have been covered by insurance." (*Id.* ¶113) The Complaint also alleges that Chase failed to contemporaneously notify the Investors either of the DOJ's intervention in the *qui tam* action or Medicare's threat to debar Millennium. (*Id.* ¶¶118-21) Based on these alleged failures, Plaintiff asserts claims against Chase for breach of contract after the April 16, 2014 closing date. (*Id.* ¶¶196-207)

VII. Procedural History

On August 1, 2017, the Complaint was filed in Supreme Court of the State of New York, New York County. (*Id.*) On August 21, 2017, Defendants removed the case to this District, asserting jurisdiction under the Edge Act, 12 U.S.C §632. (Notice of Removal (Dkt. No. 1)) On October 4, 2017, Plaintiff moved to remand (Pltf. Mot. (Dkt. No. 26)), arguing that there is no jurisdiction under the Edge Act. (Pltf. Br. (Dkt. No. 26-1)) On September 24, 2018, this Court denied Plaintiff's motion to remand. (Dkt. No. 38) Defendants have moved to dismiss for failure to state a claim. (Dkt. No. 76)

DISCUSSION

I. Motion To Dismiss Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In considering a motion to dismiss . . . the court is to accept as true all facts alleged in the complaint," *Kassner*, 496 F.3d at 237 (citing *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 87 (2d Cir. 2002)), and must "draw all reasonable inferences in favor of the plaintiff." *Id.* (citing *Fernandez v. Chertoff*, 471 F.3d 45, 51 (2d Cir. 2006)).

A complaint is inadequately pled "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement,'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557), and does not provide factual allegations sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

Fed. R. Civ. P. 9(b) sets standards for pleading fraud claims and requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see also In re Pfizer Inc. Sec. Litig.*, 584 F. Supp. 2d 621, 632-33 (S.D.N.Y. 2008) (quoting *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001)). Rule 9(b) requires a plaintiff to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 462 (S.D.N.Y. 2009) (quoting *Stevelman v. Alias Research, Inc.*, 174 F.3d 79, 84 (2d Cir. 1999) (internal quotation marks omitted)).

II. State Securities Law Claims

Defendants Chase, JPM Securities, Citibank, and Citi-Global (collectively, "Chase and Citi") have moved to dis-

miss Plaintiff's claims under the securities laws of California, Colorado, Illinois, and Massachusetts—so-called "blue sky laws"—on the ground that "a syndicated bank loan is not a 'security' and a loan syndication is not a 'securities distribution.'" (Chase and Citi. Br. (Dkt. No. 77) at 10) Defendants Bank of Montreal, BMO Capital Markets, SunTrust Bank, and SunTrust Robinson Humphrey (collectively, "BMO and SunTrust") join in Chase and Citi's arguments, and offer additional grounds for dismissal. (BMO and SunTrust Br. (Dkt. No. 80) at 5) Plaintiff contends that the Millennium notes are securities, and thus subject to the state security laws. (Pltf. Opp. Br. (Dkt. No. 81) at 22)

A. Legal Standards

In determining whether debt obligations such as the Millennium notes are "securities," courts apply the "family resemblance" test set forth in *Reves v. Ernst & Young*. 494 U.S. 56 (1990). For purposes of resolving Defendants' motion to dismiss, this Court accepts Plaintiff's assertion that *Reves* applies to Plaintiff's claims under California, Colorado, Illinois, and Massachusetts law. (*See* Pltf. Opp. Br. (Dkt. No. 81) at 21 n.9)

In *Reves*, the Supreme Court instructed that "because the Securities Acts define 'security' to include 'any note,'" courts should "begin with a presumption that every note is a security." *Reves*, 494 U.S. at 65. The Court adopted the Second Circuit's "list of instruments commonly denominated 'notes' that nonetheless fall without the 'security' category," however. *Id.* "[T]ypes of notes that are not 'securities' include 'the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a "character" loan to a bank customer, short-term notes secured by an as-

signment of accounts receivable, [ ]a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized' [and] 'notes evidencing loans by commercial banks for current operations.'" *Id.* at 65, 67 (first quoting *Exchange Nat. Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1138 (2d Cir. 1976), then quoting *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 939 (2d Cir. 1984)). The presumption that a note is a security "may be rebutted only by a showing that the note bears a strong [family] resemblance . . . to one of the enumerated categories of instrument" set forth above. *Id.* at 67.

The four factors of the family resemblance test are: (1) "the motivations that would prompt a reasonable seller and buyer to enter into [the transaction]"; (2) "the plan of distribution of the instrument"; (3) 'the reasonable expectations of the investing public"; and (4) "the existence of another regulatory scheme [to reduce] the risk of the instrument, thereby rendering application of the Securities Act unnecessary." *Id.* at 66-67.

B. Analysis

Plaintiff argues that the determination of whether an instrument is a security "is a fact intensive question and generally 'not appropriately resolved on a motion to dismiss.'" (Pltf. Opp. Br. (Dkt. No. 81) at 20 (quoting *S.E.C. v. Rorech*, 673 F. Supp. 2d 217, 225 (S.D.N.Y. 2009) (citation omitted))) Courts in this District have on occasion, however, concluded on a motion to dismiss that a particular instrument is not a security under *Reves*. *See, e.g.*, *Intelligent Digital Sys., LLC v. Visual Mgmt. Sys., Inc.*, 683 F. Supp. 2d 278, 281, 283, 286 (finding on a motion to dismiss that an "unsecured convertible promissory note" is not a security) (E.D.N.Y. 2010); *Benedict v. Amaducci*,

No. 92 CIV. 5239 (KMW), 1995 WL 413206, at *1, *10 (S.D.N.Y. July 12, 1995) (finding on a motion to dismiss that several notes at issue were not securities). In analyzing the four *Reves* factors here, this Court assumes the truth of the Complaint's factual allegations.

1. *Motivations of Seller and Buyer*

The first *Reves* factor requires to consider "the motivations that would prompt a reasonable seller and buyer to enter into [a particular transaction]":

> If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a "security."

Reves, 494 U.S. at 66; *see also Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808, 812 (2d Cir. 1994) (the first *Reves* factor asks "whether the motivations are investment (suggesting a security) or commercial or consumer (suggesting a non-security)").

In arguing that the Millennium notes are securities—Plaintiff points out that Chase assigned an "analyst who normally covered high-yield debt securities" to this transaction; referred to participants as "public investors"; and "employed practices and terminology specific to an investment transaction." (Pltf. Opp. Br. (Dkt. No. 81) at 24)

Defendants counter that the Millennium notes offered a fixed rate of return, without any opportunity to share in

profits earned by Millennium. (*See* Chase and Citi Br. (Dkt. No. 77) at 23 (citing Credit Agreement (Dkt. No. 79-1) §§2.14-2.15 (providing for a market rate of interest plus a fixed "applicable margin" that varies depending on the lender's tranche))) In *Pollack*, however, the Second Circuit held that "the district court erred in finding that the fixed rate of return cut against the presumption that the notes are securities." *Pollack*, 27 F.3d at 813.

Defendants also cite the seller's motivation, which was to pay dividends and to satisfy or refinance existing debt. (Cmplt. (Dkt. No. 1-1) ¶¶49, 69) Defendants argue that "[t]hese are core commercial lending functions not traditionally associated with securities offerings." (Citi and Chase Br. (Dkt. No. 77) at 23)

Applying the *Reves* dichotomy—where "the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments . . . the instrument is likely to be a 'security,'" but where "the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, . . . the note is less sensibly described as a 'security,'" *Reves*, 494 U.S. at 66—the Millennium notes are not, from the seller's perspective, for the purpose of an investment or for Millennium's general use. Instead, from Millennium's perspective, the Notes are better described as advancing "some other commercial purpose[s]": loan repayment and the paying of a dividend.

From the buyers' perspective, however, the purpose of acquiring the Notes appears to have been investment. Many of the ultimate purchasers are pension and retirement funds who purchased the Millennium Notes for their investment portfolios. (Pltf. Opp. Br. (Dkt. No. 81) at 23)

Given that the buyers' and sellers' motivations are mixed, this factor does not weigh heavily in either direction.

2. *Plan of Distribution*

The second *Reves* factor considers "the plan of distribution" for the instrument, including whether it is subject to "common trading for speculation or investment." *Reves*, 494 U.S. at 66.

Defendants argue that the purchasers of the Notes "are a small group of sophisticated institutions; members of the general public were not solicited and did not participate in the loan syndication." (Chase and Citi Br. (Dkt. No. 77) at 23 (citing Cmplt. (Dkt. No. 1-1) ¶66)) The Lender Schedule attached to the Complaint indicates that only a few hundred Parent and Child Investors purchased the Notes. (*See* Lender Schedule (Dkt. No. 1-3)) Moreover, while the Notes can be assigned, an assignment can take place only with the consent of a Lender, Lender affiliate, or "Approved Fund," which itself must have some connection to a Lender or Lender Affiliate. (Credit Agreement (Dkt. No. 79-1) §10.6) The Notes cannot be assigned to a natural person, which reduces the potential for unsophisticated investors to acquire Notes in the secondary market. (*Id.*)

Plaintiff argues that Defendants "solicited hundreds of investment managers across the country," and had an "extremely low" minimum investment amount of $1 million that "did not apply to the investment managers' clients." Plaintiff further alleges that the Notes "began trading in secondary markets immediately." (Pltf. Opp. Br. (Dkt. No. 81) at 25-26) Moreover, "[t]here was no minimum amount on trades with affiliates of initial investors, and thus, many such investors had holdings well under $1 million[,] . . . . [including] numerous 'SubAccount[s]/Fund[s]'

with investment amounts between $130,000 and $665,000)." (*Id.* at 18 n.6)

The Court concludes that the plan of distribution here is relatively narrow. As in *Banco Espanol*, the restrictions on the Notes "worked to prevent the loan participations from being sold to the general public." *Banco Espanol*, 973 F.2d at 55. Acknowledging that "hundreds of investment managers" were solicited, this constitutes a relatively small number compared to the general public. And, as in *Banco Espanol*, "only institutional and corporate entities were solicited." *Id.* The $1 million minimum investment amount, while small in comparison to the size of the Notes, is a high absolute number that would only allow sophisticated investors to participate. That certain affiliates of Parent Investors received sub-allocations in the hundreds of thousands of dollars does not change the result. Instead, it merely reflects the fact that sophisticated investors have complex corporate structures through which they arrange their business and financial affairs. In any event, such affiliates are by definition not the "general public."

While Plaintiff has also alleged that the Notes were traded in an "immediate" secondary market that saw "daily price fluctuations" (Pltf. Opp. Br. (Dkt. No. 81) at 26 (citing Cmplt. (Dkt. No. 1-1) ¶¶96, 115)), Plaintiff has not pled that this trading in the secondary market broadened the distribution of the Notes significantly. Indeed, the trading in the secondary market appears to have been consistent with the aforementioned transfer restrictions.

The Court concludes that the second *Reves* factor weighs strongly in favor of finding that the Notes are not securities. *See Banco Espanol*, 973 F.2d at 55 (finding that a note was not a security where the "plan of distribution . . . worked to prevent the loan participations from being sold

to the general public"); *Pollack*, 27 F.3d at 814 (finding that a note was a security, in part, because of "broad-based, unrestricted sales to the general investing public).

3. *Reasonable Expectations of the Investing Public*

The third *Reves* factor is "the reasonable expectations of the investing public: The Court will consider instruments to be 'securities' on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not 'securities' as used in that transaction." *Reves*, 494 U.S. at 66.

Here, Defendants argue that "[t]he governing documents"—including the Confidential Informational Memorandum ("CIM") distributed to potential investors and the Credit Agreement—"made clear to the parties that they were participating in a lending transaction, not investing in securities." (Citi and Chase Br. (Dkt. No. 77) at 24-25)

This Court agrees with Defendants that the Credit Agreement and CIM would lead a reasonable investor to believe that the Notes constitute loans, and not securities. For example, the Credit Agreement repeatedly refers to the underlying transaction documents as "loan documents," and the words "loan" and "lender" are used consistently, instead of terms such as "investor." (*See, e.g.*, Credit Agreement (Dkt. No. 79-1) §2.1 ("each Tranche B Term Lender severally agrees to make a term loan")) The CIM also consistently refers to prospective purchasers of the Notes as "lender[s]." (CIM (Dkt. No. 79-2) at 4 ("[w]e hereby authorize your distribution of Evaluation Materials . . . to lenders and potential lenders"; "the Loan Documents will contain covenants requiring that the Company will provide to the Administrative Agent and the lenders audited and unaudited financial statements"))

In *Banco Espanol*, the court found the use of such terms significant, concluding that buyers "were given ample notice that the instruments were participations in loans and not investments in a business enterprise." *Banco Espanol*, 973 F.2d at 55; *cf. Reves*, 494 U.S. at 69 ("The advertisements for the notes here characterized them as 'investments,' . . . and there were no countervailing factors that would have led a reasonable person to question this characterization. In these circumstances, it would be reasonable for a prospective purchaser to take the [seller] at its word.").

Plaintiff argues, however, that provisions in the Credit Agreement and CIM relating to non-public information "reflect the parties' understanding and expectation that purchases and sales of the Millennium Notes . . . may be subject to Federal and state securities laws."[4] (Pltf. Opp. Br. (Dkt. No. 81) at 26-27) This argument is not persuasive. The Lenders' agreement to keep non-public information confidential, and "not to use . . . non-public information other than in connection with the making and administration of the Loans," is simply that. It does not signal that the Notes are securities or that the transaction is subject to the securities laws.

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[4] *See* Credit Agreement (Dkt. No. 79-1) §10.15 ("[E]ach Lender agrees to keep confidential all non-public information provided to it by any Loan Party, the Administrative Agent or any Lender pursuant to or in connection with this Agreement, and further not to use any such non-public information other than in connection with the making and administration of the Loans. . . ."); CIM (Dkt. No. 79-2) at 4 ("We hereby authorize your distribution of Evaluation Materials . . . to lenders and potential lenders, including representatives of such lenders who indicate . . . that they would not wish to receive information that would be deemed material non-public information within the meaning of the United States federal and state securities laws . . . if the Parties had publicly-traded securities outstanding.").

Plaintiff also cites market commentary to the effect that term loans now commonly contain features that "mirror[] a high yield bond issuance." (Pltf. Opp. Br. (Dkt. No. 81) at 27-28) Plaintiff's reference to these publications is unavailing. Two articles merely describe "[a] number of bond-like features [that] have appeared in term loan agreements." Term Loans and High Yield Bonds: Tracking the Convergence, Practical Law Article 5-520-2458; Meyer C. Dworkin & Monica Holland, The International Comparative Guide to Lending & Secured Finance 2014 at 26 (2d ed. 2014). Another article cited by Plaintiff cuts against its argument; that publication states that "[i]nterests in bank debt . . . typically have been considered not to constitute 'securities' for purposes of the securities laws." Private Equity, Restructuring and Finance Developments—Trading in Distressed Debt at 2, Wachtell, Lipton, Rosen & Katz (Jan. 20, 2009).

Plaintiff has cited no case in which a court has held that a syndicated term loan is a "security," and this Court has found no such case in its review of *Reves* and its progeny. Given these circumstances, Plaintiff's claim of a shift in the market are premature at best.

The Court concludes that the "reasonable expectations of the investing public" factor weighs in favor of finding that the Notes are not securities. *See Banco Espanol*, 973 F.2d at 55 (finding that notes were not securities because borrowers "were given ample notice that the instruments were participations in loans and not investments in a business enterprise").

4. *Existence of Another Regulatory Scheme*

The last *Reves* factor is "the existence of another regulatory scheme [to reduce] the risk of the instrument, thereby rendering application of the Securities Act unnecessary." *Reves*, 494 U.S. at 67. The parties disagree

as to whether interagency guidance and others measures taken by the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board (collectively, "Federal banking regulators") constitutes such a regulatory scheme.

Plaintiff argues that Federal banking regulators "ensure sound banking practices and minimize risks to bank, not risks to non-bank investors." (Pltf. Opp. Br. (Dkt. No. 81) at 29) Defendants counter (*see* Citi and Chase Br. (Dkt. No. 77) at 25) that in *Banco Espanol* the Second Circuit affirmed the district court's finding "that the Office of the Comptroller of the Currency has issued specific policy guidelines addressing the sale of loan participations," and relied in part on "the existence of another regulatory scheme" in concluding that "application of the securities laws was unnecessary." *Banco Espanol*, 973 F.2d at 55-56.

The primary focus of Federal banking regulators is presumably the safety and soundness of banks, rather than protection of note holders. Having said that, in *Banco Espanol*, the Second Circuit appeared to distinguish the entirely unregulated scenario at issue in *Reves*, 494 U.S. at 69 (involving "uncollateralized and uninsured" instruments and "no risk-reducing factor") from the market for the sale of loan participations to "sophisticated purchasers," which is subject to policy guidelines from the Comptroller. *Banco Espanol*, 973 F.2d at 55.

In light of *Banco Espanol*, this Court concludes that the fourth Reves factor weighs in favor of finding that the Notes are not securities.

5. *Summary*

The second, third, and fourth *Reves* factors weigh in favor of finding the Notes "analogous to the enumerated

category of loans issued by banks for commercial purposes." *Banco Espanol*, 973 F.2d at 56. The first factor does not weigh strongly in either direction.

Having conducted the *Reves* analysis, the Court concludes that the limited number of highly sophisticated purchasers of the Notes would not reasonably consider the Notes "securities" subject to the attendant regulations and protections of Federal and state securities law. Instead, it would have been reasonable for these sophisticated institutional buyers to believe that they were lending money, with all of the risks that may entail, and without the disclosure and other protections associated with the issuance of securities. The presumption that the Notes are securities is thus overcome under the facts of this case. Accordingly, Defendants' motion to dismiss will be granted as to Causes of Action One through Six on the ground that the Notes are not securities.

III. NEGLIGENT MISREPRESENTATION

Defendants have moved to dismiss Plaintiff's negligent misrepresentation claim. The parties dispute what state's law applies. Defendants argue that the Notes are governed by New York law, and that accordingly New York law applies to Plaintiff's negligent misrepresentation claim. (Citi and Chase Br. (Dkt. No. 77) at 30) Plaintiff contends that negligent misrepresentation is a tort claim; that choice of law is dictated by where the injury occurred; and that here the injury occurred in the domiciles of the Trust's beneficiaries. (Pltf. Opp. Br. (Dkt. No. 81) at 36)

"A federal court, sitting in diversity, must look to the choice-of-law rules of the state in which it sits—here New York—to resolve the conflict-of-law questions." *AroChem International, Inc. v. Buirkle*, 968 F.2d 266, 269-70 (2d Cir. 1992) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). "New York law employs an 'in-

terest analysis' in tort actions that applies the law of the jurisdiction with the greatest interest in the litigation. Under this analysis, the court should focus almost exclusively on the parties' domiciles and the locus of the tort." *Roselink Inv'rs, L.L.C. v. Shenkman*, 386 F. Supp. 2d 209, 225 (S.D.N.Y. 2004) (citations omitted). "In cases in which conduct cuts across several jurisdictions, the Second Circuit has made clear that the law of the jurisdiction with the most significant contacts in the case governs. New York courts agree that conduct should be weighed for choice-of-law purposes when it cuts across multiple jurisdictions. This weighing of conduct is in line with the core principle of New York's approach, interest balancing." *Kashef v. BNP Paribas SA*, No. 16-CV-3228 (AJN), 2020 WL 1047573, at *7 (S.D.N.Y. Mar. 3, 2020) (internal quotation marks, citations, and alterations omitted).

Here, Plaintiff does not plead where its beneficiaries—the original lenders—reside, but instead merely asserts that the Trust beneficiaries have "claims under the Blue Sky laws of California, Colorado, Illinois and Massachusetts." (Cmplt. Dkt. No. 1-1) ¶21) In opposing Defendants' motion to dismiss, Plaintiff still does not assert where the Trust beneficiaries reside. Instead, Plaintiff merely argues that "[i]njury occurred in the many states where investors were located," and that "[u]nlike New York, most states—including California and others relevant here—do not require a privity-like or special relationship to impose a tort duty." (Pltf. Opp. Br. (Dkt. No. 81) at 36) Plaintiff thus appears to suggest that some Trust beneficiaries sustained their alleged injuries in states that do not require a special relationship. Plaintiff, goes on to argue, however, that it "has adequately pled negligent misrepresentation under New York law." (*Id.* at 37 (emphasis removed))

Plaintiff's approach to choice of law analysis is untenable, because New York law requires a court to apply the law of "the [single] jurisdiction with the greatest interest" and "the most significant contacts," not to construct a composite based on law drawn from a variety of states that may or may not collectively reflect a majority interest. *Roselink Inv'rs*, 386 F. Supp. 2d at 225; *Kashef*, 2020 WL 1047573, at *7. Neither the Complaint nor Plaintiff's briefing demonstrates that a state other than New York has "the greatest interest" in or the "most significant contacts" with this litigation.

Plaintiff—as trustee—pleads that he is a resident of New York (Cmplt. (Dkt. No. 1-1) ¶10; *see In re Tremont Sec. Law, State Law, & Ins. Litig.*, No. 08 CIV. 11117, 2013 WL 2257053, at *4 (S.D.N.Y. May 23, 2013) (finding that under Texas' "most significant relationship" test, Texas law applied to negligent misrepresentation claim because "the parties were spread across several jurisdictions," and "though the Trust is a Cayman Islands entity, its Protector is domiciled in Texas")) As to the Trust's beneficiaries, the greatest number appear to be domiciled in the Cayman Islands, but many—including Cornell University, New York Life Insurance Company, the New York State Common Retirement Fund, the United States Life Insurance Company in the City of New York, Metropolitan Life Insurance Company, and The City of New York Group Trust—are headquartered in New York. (*See* Lender Schedule (Dkt. No. 1-3)) As to the Defendants, all save three—Bank of Montreal (Canada), SunTrust Bank (Georgia), and SunTrust Robinson Murphy (Georgia)—are domiciled in New York. (Cmplt. (Dkt. No. 1-1) ¶¶11-20) Finally, at least some of the alleged misrepresentations occurred in part in New York, the place from which the CIM originated. (CIM (Dkt. No. 79-2) at 4)

Because Plaintiff has not demonstrated that any particular state has a greater interest in or more significant contacts with this litigation than New York, Plaintiff has not provided this Court with a basis to apply the common law of any state other than New York. Accordingly, this Court will test the sufficiency of Plaintiff's negligent misrepresentation claim under New York law. *See Roselink Inv'rs*, 386 F. Supp. 2d at 225; *Kashef*, 2020 WL 1047573, at *7.

Under New York law—as Plaintiff acknowledges (Pltf. Opp. Br. (Dkt. No. 81) at 37)—a party bringing a negligent misrepresentation claim must plead facts demonstrating that "(1) the parties stood in some special relationship imposing a duty of care on the defendant to render accurate information; (2) the defendant negligently provided incorrect information; and (3) the plaintiff reasonably relied upon the information given." *LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 525 (S.D.N.Y. 2014) (citation omitted). Accordingly, in order for "a party [to] recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." *Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 382 (1992) (citations omitted).

Plaintiff argues that a "special relationship" existed here because "investors were in privity with the Initial Lender Defendants as assignees," and "Defendants were uniquely situated and possessed special knowledge about Millennium . . . ." (Pltf. Opp. Br. (Dkt. No. 81) at 37) In support of its "uniquely situated" argument, Plaintiff cites *Kimmell v. Schaefer*, 89 N.Y.2d 257 (1996). (*Id.* at 38)

In *Kimmel*, the defendant was the issuer's "chief financial officer . . . [and] the contact person . . . for the [investment] project"; it was his responsibility to seek investors for the limited partnership. *Kimmell*, 89 N.Y.2d at 260-51. Defendant "met with each plaintiff, and personally represented that the [investment] project would generate some income"; he "urged plaintiffs to review and rely on the projections [he had overseen]; he "informed [plaintiff] that he could provide 'hot comfort' should plaintiff entertain any reservations about investing"; he "personally requested 'updated' projections, which he represented were reasonable and generated after a 'thorough discussion . . .'"; and he "personally received a $20,000 commission for his efforts on behalf of the [investment] project." *Id.* at 265.

Here, Plaintiff claims that "Defendants had knowledge superior to that of the Investors of the facts surrounding the DOJ Investigation because of the[ir] unique access," including to Millennium's general counsel. (Cmplt. (Dkt. No. 1-1) ¶¶41-42, 176) But the Complaint does not contain factual allegations demonstrating that Defendants used this "unique access" to induce purchase of the Notes.

For example, Plaintiff asserts that Chase "controlled every aspect of the rating process for Millennium, down to writing the Rating Agency Presentation . . . and scripting oral responses to [rating agency] questions . . . ." (*Id.* ¶52) But this activity was directed at a third party and not Plaintiff's beneficiaries.

Plaintiff also makes much of an investor call in which Michael Loucks of Skadden, Arps, Slate, Meagher & Flom LLP—outside counsel for Millennium—"opine[d] as to the likely immateriality of the result [of the DOJ investigation] on Millennium's finances. . . ." (*Id.* ¶58) Defendants' outside counsel led the questioning of Loucks

during this call. According to Plaintiff, one of Defendants' lawyers "jumped in with a leading question," and Loucks responded that one "could conclude that" Millennium's exposure—as a result of the DOJ investigation—would be less than $20 million. (*Id.* ¶¶56-58) But Plaintiff has not alleged that Defendants had any control over Loucks or what he said during this investor call, and potential investors participating in the call were presumably free to ask Loucks any question they wished regarding Millennium's potential exposure. The facts here are clearly much different than in *Kimmel*, where the defendant was responsible for generating the data designed to promote the investment, and presented that data to potential investors.

As to privity, Plaintiff asserts that "investors were in privity with the Initial Lender Defendants as assignees," and that Chase was a "party to the Assignment and Assumption Agreements with investors, [and] served as agent for all Defendants with respect to the initial funding of the transaction." (Pltf. Opp. Br. (Dkt. No. 81) at 37) Plaintiff is thus arguing that the alleged privity arises from the contract itself.

Assuming *arguendo* that the agreements with investors demonstrate privity, Plaintiff cannot overcome disclaimers in these agreements that are fatal to its negligent misrepresentation claim. Section 9.6 of the Credit Agreement states that Chase, the "Administrative Agent[,] shall not have any duty or responsibility to provide any Lender with any credit or other information . . . ." (Credit Agreement (Dkt. No. 79-1) §9.6) And Section 9.6 further provides that "[e]ach Lender also represents that it will, independently and without reliance upon any Agent or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis . . . ." (*Id.*) Accord-

ingly, the agreements on which Plaintiff relies to claim privity contain a clear disclaimer of the "special relationship" and "duty of care" alleged by Plaintiff.

This case is analogous to *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485 (S.D.N.Y. 2003). In *UniCredito*, the court dismissed a negligent misrepresentation claim because "even if the bank Defendants had the knowledge the Complaint attributes to them, the banks had no duty to disclose it to Plaintiffs." *UniCredito*, 288 F. Supp. 2d at 499. There, as here, "the lenders specifically agreed that they had, and would continue to, make their own credit decisions and would not rely on the Defendant banks, either in entering into the facilities or in making decisions in the course of the performance of the relevant agreements." *Id.*

Plaintiff argues that *UniCredito* is distinguishable for two reasons: (1) in that case, "the banks were not in contractual privity with the plaintiffs"; and (2) "Defendants [here] prevented Millennium from making necessary disclosures." (Pltf. Opp. Br. (Dkt. No. 81) at 39 n.23) But *UniCredito* turns on the same type of disclaimer seen here, and—as discussed above—Plaintiff has not pled factual allegations demonstrating that Defendants prevented Millennium from making necessary disclosures to the investors.

Plaintiff also argues that the contractual disclaimers are not effective, because "'disclaimers do not preclude the finding of a special relationship.'" (Pltf. Opp. Br. (Dkt. No. 81) at 39 (quoting *Fin. Guaranty Ins. Co. v. Putnam Advisory Co.*, 783 F.3d 395, 406 (2d Cir. 2015)))

Fin. Guaranty Ins. does not involve a claim of contractual privity. *See Fin. Guaranty Ins.*, 783 F.3d at 405 ("It is undisputed that there was no actual contractual privity between [plaintiff and defendant].") The plaintiff

in that case instead contended that defendant "owed it a duty of care" under *Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 59-61 (2d Cir. 2012), in which the Second Circuit held that an investor in a collateralized debt obligation ("CDO") could bring a negligence action against the defendant CDO manager—even absent contractual privity—where "'(1) the defendant had awareness that its work was to be used for a particular purpose; (2) there was reliance by a third party known to the defendant in furtherance of that purpose; and (3) there existed some conduct by the defendant linking it to that known third party evincing the defendant's understanding of the third party's reliance.'" *Id.* at 405-06 (quoting *Bayerische Landesbank*, 692 F.3d at 59).

In reversing the district court's dismissal of the complaint, the Second Circuit found that the disclaimers at issue in *Fin. Guaranty Ins.*—statements in a "pitchbook" and offering memorandum that defendant was not "'acting as a financial advisor'" or in a "'fiduciary capacity,'" and that investors should "'rely on their own examination of the co-issuers and the terms of the offering, including the merits and risks involved'"—"do not preclude the finding of a special relationship between [plaintiff and defendant]." *Id.* at 406.

That case turns, however, on the court's finding that the disclaimers at issue did not track the misrepresentations plaintiff alleged. Plaintiff alleged that defendant "represented that it would select the collateral for [the investment vehicle] and that it would do so independently and in good faith." *Id.* Defendant instead "cede[d] control of the collateral selection process to other market participants with interests adverse to long investors . . . ." *Id.* As the disclaimers cited by defendant did not disclose the possibility that defendant would "cede control" in this

fashion, they "'[fell] well short of tracking the particular misrepresentations alleged'" by plaintiff. *Id.* at 406-07 (quoting *Caiola v. Citibank, N.A., N.Y.*, 295 F.3d 312, 330 (2d Cir. 2002)).

Here, by contrast, the contractual disclaimers at issue address the evaluation of credit risk, which is exactly what the alleged misrepresentations relate to. Accordingly, the agreements on which Plaintiff relies provide no basis for a negligent misrepresentation claim.

For all these reasons, Defendants' motion to dismiss Plaintiff's negligent misrepresentation claim will be granted.

IV. BREACH OF FIDUCIARY DUTY

Chase seeks dismissal of Plaintiff's breach of fiduciary duty claim, arguing that it had no such duties under the Credit Agreement. (Citi and Chase Br. (Dkt. No. 77) at 33-34)

"In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007) (citing *Ozelkan v. Tyree Bros. Envtl. Servs.*, 29 A.D.3d 877, 879 (2d Dept. 2006)); *see also Kidz Cloz, Inc. v. Officially for Kids, Inc.*, No. 00 CIV. 6270 (DC), 2002 WL 392291, at *4 (S.D.N.Y. Mar. 13, 2002). "A fiduciary relationship exists under New York law 'when one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" *Kidz Cloz, Inc.*, 2002 WL 392291, at *4 (quoting *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 599 (2d. Cir. 1991)). "Generally, where parties have entered into a contract, courts look to that agreement 'to discover . . . the nexus of [the parties'] relationship and the particular contractual ex-

pression establishing the parties' interdependency . . . .'" *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19-20 (2005) (citations omitted) (alterations in original).

Chase argues that it had no fiduciary duty under "the plain terms of the Credit Agreement," which states that the "'Administrative Agent shall not have any duties or responsibilities, except those expressly set forth herein, or any fiduciary relationship with any Lender.'" (Def. Br. (Dkt. No. 77) at 33-34 (quoting Credit Agreement (Dkt. No. 79-1) §9.1))

Plaintiff contends, however, that this provision confers "express agency [which] by definition creates fiduciary duties." (Pltf. Opp. Br. (Dkt. No. 81) at 41) Plaintiff does not otherwise provide a basis for an agency relationship that gives rise to fiduciary duties in these circumstances, but instead cites authority providing that "general or broad language" is insufficient for an agent to disclaim fiduciary duties. (*Id.* at 41-42 (quoting Restatement (Third) of Agency §8.06, cmt. b (2006)))

As discussed above with respect to negligent misrepresentation, however, Chase is not relying solely on a general disclaimer in the Credit Agreement. Instead, Chase is relying on a specific disclaimer in the same section of the agreement that allegedly creates the agency relationship. This Court cannot impose a broader agency relationship than that to which the parties agreed in their contract. *See EBC I*, 5 N.Y.3d at 20. Since the parties agreed that Chase, as agent, would have only limited and non-fiduciary duties, Defendants' motion to dismiss Plaintiff's breach of fiduciary duty claim will be granted.

V. Breach Of Contract Claims

Defendants have moved to dismiss Plaintiff's two breach of contract claims. (Def. Br. (Dkt. No. 77) at 35) The

Ninth Cause of Action seeks to hold Chase liable for "enforcement of conditions precedent to the Closing" which Millennium "fail[ed] . . . to satisfy." (Cmplt. (Dkt. No. 1-1) ¶¶190, 194) The Tenth Cause of Action seeks to hold Chase liable for its alleged failure "to provide notice . . . to all Investors" of Millennium's default. Chase allegedly had notice of Millennium's default "on and after the closing date." (*Id.* ¶¶197-200)

A. Conditions Precedent

Plaintiff claims that Chase "breached Credit Agreement Sections 2.1, 2.2, 5.1, 5.2 and 9.4, and the definition of 'Closing Date' incorporated therein, by conducting a closing and triggering investors' commitments when [it] knew that . . . false representations and warranties breached the conditions precedent for the closing and commitments." (Pltf. Opp. Br. (Dkt. No. 81) at 43) Defendants argue that Chase "is not responsible for representations, warranties, or other statements made by Millennium in the Credit Agreement, or Millennium's failure to perform its obligations under those documents." (Def. Br. (Dkt. No. 77) at 35)

The sections of the Credit Agreement cited by Plaintiff provide no support for its breach of contract claim. The "Closing Date" in the Credit Agreement is defined as "the date on which the conditions precedent set forth in Section 5.1 shall have been satisfied . . . ." (Credit Agreement (Dkt. No. 79-1) §1.1) Sections 2.1 and 2.2 of the Credit Agreement set forth the commitments of the term loan and the procedure for borrowing under it. (*Id.* §§2.1, 2.2) Section 5.1 sets forth in great detail the conditions precedent, none of which refer to representations and warranties or Chase's duties as Administrative Agent. (*Id.* §5.1) Section 5.2 provides that the Lenders' agreement "is subject to the satisfaction of . . . conditions prece-

dent," including that "the representations and warranties made by any Loan Party . . . shall be true and correct." (*Id.* §5.2) And Section 9.4 provides that Chase, as Administrative Agent, "shall be entitled to rely . . . upon any [document] believed by it to be genuine and correct. . . ." (*Id.* §9.4)

None of these provisions suggest that Chase has a duty to enforce compliance with, or investigate, Millennium's representations and warranties. And Section 9.3 of the Credit Agreement absolves Chase from liability "for any recitals, statements, representations or warranties made by any Loan Party" and from "any obligation . . . to ascertain or to inquire as to the observance or performance of any of the . . . conditions . . . ." (*Id.* §9.3)

Plaintiff argues that Section 9.3 is irrelevant because Chase "actually knew Millennium's representations were false and that conditions precedent had not been satisfied." (Pltf. Opp. Br. (Dkt. No. 81) at 43 (emphasis in original)) Plaintiff also cites a number of cases holding that, in such circumstances, Chase may not rely on those representations. (*Id.* at 43-44) But Plaintiff does not cite any contractual provision in which Chase takes on an obligation to do anything with respect to Millennium's representations and warranties, or the conditions precedent, except for administrative actions that are not relevant here. Indeed, the evidence is all to the contrary. Chase's alleged actual knowledge is thus irrelevant to Plaintiff's breach of contract claim.

Because there is no evidence that Chase had a duty of "observance and enforcement of conditions precedent [prior] to the Closing" (Cmplt. (Dkt. No. 1-1) ¶190), Defendants' motion to dismiss this breach of contract claim will be granted.

B. Failure to Provide Notice

Plaintiff claims that Chase "actually knew of a Default" but failed to provide notice as required under Section 9.5 of the Credit Agreement. (Pltf. Opp. Br. (Dkt. No. 81) at 44 (emphasis in original))

Defendants contend that Chase "is only deemed to have notice (a prerequisite for triggering any duty to notify) after receipt of a formal notice of default." (Def. Br. (Dkt. No. 77) at 36)

Section 9.5 of the Credit Agreement provides that, "[i]n the event that the Administrative Agent receives [a notice of default], the Administrative Agent shall give notice thereof to the Lenders." (Credit Agreement (Dkt. No. 79-1) §9.5) This provision does not generally require the Administrative Agent to provide notice when it knows of default. To the contrary, Section 9.5 states that "[t]he Administrative Agent shall not be deemed to have knowledge or notice of the occurrence of [default] unless the Administrative Agent has received notice from a Lender, Holdings, or Borrower referring to this Agreement . . . ." (*Id.*) Plaintiff does not allege that Chase received such a notice of default, and accordingly the plainly ministerial duty cited by Plaintiff was never triggered.

Defendants' motion to dismiss this breach of contract claim will be granted.

VI. Breach Of Covenant Of Good Faith

Defendants have moved to dismiss Plaintiff's claim for breach of the implied covenant of good faith and fair dealing against Chase, arguing that this claim "is barred by the express terms of the Credit Agreement." (Def. Br. (Dkt. No. 77) at 36)

Although the Complaint does not cite to the New York Uniform Commercial Code ("N.Y. U.C.C."), Plaintiff claims

that Chase's duties here are governed by the N.Y. U.C.C. (Pltf. Opp. (Dkt. No. 81) at 45)

Under N.Y. U.C.C. §1-304, "[e]very contract or duty within this act imposes an obligation of good faith in its performance and enforcement." N.Y. U.C.C. Law §1-304 (McKinney). "This section does not support an independent cause of action for failure to perform or enforce in good faith[, however]. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract . . . ." *Id.* cmt. 1.

Plaintiff contends that neither the duty of good faith, nor the duty to refrain from "*bad faith* conduct that fundamentally destroys another's right to receive the fruits of the contract," can be disclaimed. (Pltf. Opp. Br. (Dkt. No. 81) at 45 (emphasis in original)) A plaintiff must identify a "specific duty or obligation under the contract" that provides the basis for a good faith and fair dealing claim, however, because there is no "independent cause of action" arising out of the duty to act in good faith. N.Y. U.C.C. Law §1-304, cmt. 1 (McKinney).

Here, Plaintiff contends that Chase (1) "knew or recklessly disregarded that statements made by Millennium in connection with the 2014 Credit Agreement were not genuine and correct"; and (2) "frustrated the ability of the Investors to exercise or decide not to exercise their contractual rights by withholding from them [Chase's] own knowledge of facts and events that triggered the Investors' contractual rights." (Cmplt. (Dkt. No. 1-1) ¶205) Neither of these assertions refers back to a contractual provision that Chase allegedly breached, however.

Moreover, to the extent that Plaintiff's good faith and fair dealing claim rests on the conditions precedent and notice provisions that form the basis for Plaintiff's breach

of contract claims, its good faith and fair dealing claim must be dismissed as duplicative of its breach of contract claims. *Deutsche Bank Nat. Tr. Co. v. Quicken Loans Inc.*, 810 F.3d 861, 869 (2d Cir. 2015) ("because the facts underlying both claims are identical and the Trustee seeks identical remedies, the claim for breach of the implied covenant was properly dismissed as duplicative").

Because Plaintiff's good faith and fair dealing claim is (1) unmoored from a specific provision in the underlying contract; and (2) duplicative of its breach of contract claims, Defendants' motion to dismiss the good faith and fair dealing claim will be granted.

VII. Leave To Amend

Plaintiff has filed a motion seeking leave to amend. *See* Dkt. No. 114. Plaintiff's proposed Amended Complaint ("PAC") pleads the same factual allegations and eleven causes of action set forth in the Complaint, and adds two new claims against all Defendants: (1) fraudulent misrepresentation and fraud; and (2) conspiracy to defraud. (PAC (Dkt. No. 116-1)) Because Plaintiff's PAC includes claims that this Court has dismissed, Plaintiff's motion for leave to file the PAC is denied.

District courts "ha[ve] broad discretion in determining whether to grant leave to amend." *Gurary v. Winehouse*, 235 F.3d 793, 801 (2d Cir. 2000). Leave to amend may properly be denied in cases of "'undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see Murdaugh v. City of N.Y.*, No. 10 Civ. 7218(HB), 2011 WL 1991450, at *2 (S.D.N.Y. May 19, 2011) ("Although

under Rule 15(a) of the Federal Rules of Civil Procedure leave to amend complaints should be 'freely given,' leave to amend need not be granted where the proposed amendment is futile." (citations omitted)).

Here, Plaintiff will be granted leave to amend. "Where the possibility exists that [a] defect can be cured," leave to amend "should normally be granted" at least once. *Wright v. Ernst & Young LLP*, No. 97 CIV. 2189 (SAS), 1997 WL 563782, at *3 (S.D.N.Y. Sept. 10, 1997), aff'd, 152 F.3d 169 (2d Cir. 1998) (citing *Oliver Sch., Inc. v. Foley*, 930 F.2d 248, 253 (2d Cir. 1991)). Moreover, where a claim is dismissed on the grounds that it is "inadequate[ly] pled," there is "a strong preference for allowing [a] plaintiff[ ] to amend." *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, No. 07 CIV. 10453, 2011 WL 4072027, at *2 (S.D.N.Y. Sept. 13, 2011) (citing *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990)).

Accordingly, Plaintiff is granted leave to amend. Any motion for leave to amend will attach[ ] the proposed Amended Complaint as an exhibit.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss (Dkt. No. 76) is granted. Plaintiff's motion for leave to amend (Dkt. No. 114) is denied. The motion for leave to file a brief as *amicus curiae*, submitted by the Loan Syndications and Trading Association and Bank Policy Institute (Dkt. No. 62), is denied. The parties' motions for oral argument (Dkt. Nos. 84, 86) are denied. Plaintiff will file any motion for leave to amend by **June 5, 2020**. The Clerk of Court is directed to terminate the motions (Dkt. Nos. 62, 76, 84, 86, 114).

Dated: New York, New York
May 22, 2020

SO ORDERED.

/s/ Paul G. Gardephe
Paul G. Gardephe
United States District Judge

APPENDIX D

RELEVANT STATUTORY PROVISIONS

1. The Securities Act of 1933, codified as amended at 15 U.S.C. §§ 77s *et seq.*, provides in relevant part as follows:

§ 77b. Definitions; promotion of efficiency, competition, and capital formation

(a) Definitions

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

§ 77c. Classes of securities under this subchapter

(a) Exempted securities

Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(1) Reserved.

(2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940; or any security which is an industrial development bond (as defined in section 103(c)(2) of Title 26) the interest on which is excludable from gross income under section 103(a)(1) of Title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) of Title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security; or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participa-

tion, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, (B) an annuity plan which meets the requirements for the deduction of the employer's contributions under section 404(a)(2) of Title 26, (C) a governmental plan as defined in section 414(d) of Title 26 which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, or (D) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, other than any plan described in subparagraph (A), (B), (C), or (D) of this paragraph (i) the contributions under which are held in a single trust fund or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26 (other than a person participating in a church plan who is described in section 414(e)(3)(B) of Title 26), or (iii) which is a plan funded by an annuity contract described in sec-

tion 403(b) of Title 26 (other than a retirement income account described in section 403(b)(9) of Title 26, to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of Title 26 establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account). The Commission, by rules and regulations or order, shall exempt from the provisions of section 77e of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of Title 26, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940;

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual, or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940;

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution; or (B) by (i) a farmer's cooperative organization exempt from tax under section 521 of Title 26, (ii) a corporation described in section 501(c)(16) of Title 26 and exempt from tax under section 501(a) of Title 26, or (iii) a corporation described in section 501(c)(2) of Title 26 which is exempt from tax under section 501(a) of Title 26 and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii);

(6) Any interest in a railroad equipment trust. For purposes of this paragraph "interest in a railroad equipment trust" means any interest in an equipment trust,

lease, conditional sales contract, or other similar arrangement entered into, issued, assumed, guaranteed by, or for the benefit of, a common carrier to finance the acquisition of rolling stock, including motive power;

(7) Certificates issued by a receiver or by a trustee or debtor in possession in a case under Title 11, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(9) Except with respect to a security exchanged in a case under Title 11, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Except with respect to a security exchanged in a case under Title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(12) Any equity security issued in connection with the acquisition by a holding company of a bank under section 1842(a) of Title 12 or a savings association under section 1467a(e) of Title 12, if—

(A) the acquisition occurs solely as part of a reorganization in which security holders exchange their shares of a bank or savings association for shares of a newly formed holding company with no significant assets other than securities of the bank or savings association and the existing subsidiaries of the bank or savings association;

(B) the security holders receive, after that reorganization, substantially the same proportional share interests in the holding company as they held in the bank or savings association, except for nominal changes in shareholders' interests resulting from lawful elimination of fractional interests and the exercise of dissenting shareholders' rights under State or Federal law;

(C) the rights and interests of security holders in the holding company are substantially the same as those in the bank or savings association prior to the transaction, other than as may be required by law; and

(D) the holding company has substantially the same assets and liabilities, on a consolidated basis, as the bank or savings association had prior to the transaction.

For purposes of this paragraph, the term "savings association" means a savings association (as defined in section 1813(b) of Title 12) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(13) Any security issued by or any interest or participation in any church plan, company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940.

(14) Any security futures product that is—

(A) cleared by a clearing agency registered under section 78q-1 of this title or exempt from registration under subsection (b)(7) of such section 78q-1; and

(B) traded on a national securities exchange or a national securities association registered pursuant to section 78o-3(a) of this title.

(b) Additional exemptions

(1) Small issues exemptive authority

The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection

where the aggregate amount at which such issue is offered to the public exceeds $5,000,000.

(2) Additional issues

The Commission shall by rule or regulation add a class of securities to the securities exempted pursuant to this section in accordance with the following terms and conditions:

(A) The aggregate offering amount of all securities offered and sold within the prior 12-month period in reliance on the exemption added in accordance with this paragraph shall not exceed $50,000,000.

(B) The securities may be offered and sold publicly.

(C) The securities shall not be restricted securities within the meaning of the Federal securities laws and the regulations promulgated thereunder.

(D) The civil liability provision in section 77*l*(a)(2) of this title shall apply to any person offering or selling such securities.

(E) The issuer may solicit interest in the offering prior to filing any offering statement, on such terms and conditions as the Commission may prescribe in the public interest or for the protection of investors.

(F) The Commission shall require the issuer to file audited financial statements with the Commission annually.

(G) Such other terms, conditions, or requirements as the Commission may determine necessary in the public interest and for the protection of investors, which may include—

(i) a requirement that the issuer prepare and electronically file with the Commission and distribute to prospective investors an offering state-

ment, and any related documents, in such form and with such content as prescribed by the Commission, including audited financial statements, a description of the issuer's business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters; and

(ii) disqualification provisions under which the exemption shall not be available to the issuer or its predecessors, affiliates, officers, directors, underwriters, or other related persons, which shall be substantially similar to the disqualification provisions contained in the regulations adopted in accordance with section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77d note).

(3) Limitation

Only the following types of securities may be exempted under a rule or regulation adopted pursuant to paragraph (2): equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including any guarantees of such securities.

(4) Periodic disclosures

Upon such terms and conditions as the Commission determines necessary in the public interest and for the protection of investors, the Commission by rule or regulation may require an issuer of a class of securities exempted under paragraph (2) to make available to investors and file with the Commission periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters,

and also may provide for the suspension and termination of such a requirement with respect to that issuer.

(5) Adjustment

Not later than 2 years after April 5, 2012, and every 2 years thereafter, the Commission shall review the offering amount limitation described in paragraph (2)(A) and shall increase such amount as the Commission determines appropriate. If the Commission determines not to increase such amount, it shall report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on its reasons for not increasing the amount.

(c) Securities issued by small investment company

The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities exempted as provided in this section any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 if it finds, having regard to the purposes of that Act, that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors.

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) Use of interstate commerce for purpose of offering for sale

It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) Exemptions of section 77c not applicable to this section

The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

(d) Authority with respect to security-based swap agreements

The authority of the Commission under this section with respect to security-based swap agreements (as defined in section 78c(a)(78) of this title) shall be subject to the restrictions and limitations of section 77b-1(b) of this title.

2. The Securities Exchange Act of 1934, codified as amended at 15 U.S.C. §§ 78a *et seq.*, provides in relevant part as follows:

§ 78c. Definitions and application

(a) Definitions

When used in this chapter, unless the context otherwise requires—

* * * * *

(10) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

* * * * *