

21-2726

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket 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,
No. 17 CIV. 6334, HON. PAUL G. GARDEPHE PRESIDING

APPELLANT'S RESPONSE TO THE SUBMISSION OF THE SECURITIES AND EXCHANGE COMMISSION

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Pursuant to the Court's March 16, 2023 order ("Order"), Appellant responds to the submission of the Securities and Exchange Commission ("SEC").

The District Court relied heavily upon Appellees' argument that the Millennium Notes were like those that *Banco Español* held were not securities. The Order stated that the issue is whether the Notes "are securities" under *Reves* and, as the SEC noted, acknowledged that the Court "ha[s] not previously considered whether this type of note is a security." In short, *Banco Espanol* does not control the question presented under *Reves*.

The SEC's statement that "[d]espite diligent efforts to respond to the Court's Order and provide the Commission's views," it was "not in a position" to do so buttresses Appellant's position that a complete factual record must be developed addressing each of the *Reves* factors. Accordingly, the Court should reverse and remand to develop an appropriate factual record.

Respectfully submitted,

By: /s/ Christopher P. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 1, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 1, 2023

/s/ Christopher P. Johnson
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