UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-2187-bk

Caption [use short title]

In re: Motors Liquidation Company (Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A., individually and as Administrative Agent for various lenders party to the Term Loan Agreement described herein)

Motion for: Leave to File a Brief as Amici Curiae In Support of Rehearing En Banc

Set forth below precise, complete statement of relief sought:

The Loan Syndications and Trading Association and The Clearing House Association L.L.C. request leave to file a brief as amici curiae in support of JPMorgan's pending petition for rehearing en banc.

MOVING PARTY: Loan Syndications and Trading Association and The Clearing House Association L.L.C.

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Official Committee of Unsecured Creditors

MOVING ATTORNEY: William J. Perlstein

OPPOSING ATTORNEY: Eric B. Fisher

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Court-Judge/Agency appealed from: Bankruptcy Court for the Southern District of N.Y., Judge Robert E. Gerber

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: March 25, 2014

Signature of Moving Attorney:
s/ William J. Perlstein **Date:** February 13, 2015

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

13-2187-bk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: MOTORS LIQUIDATION COMPANY, ET AL.,
Debtors,

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MOTORS LIQUIDATION COMPANY,
Plaintiff-Appellant,

v.

JPMORGAN CHASE BANK, N.A., INDIVIDUALLY AND AS ADMINISTRATIVE AGENT FOR VARIOUS LENDERS PARTY TO THE TERM LOAN AGREEMENT DESCRIBED HEREIN,
Defendant-Appellee.

On Appeal from the United States Bankruptcy Court
for the Southern District of New York, Nos. 09-50026 and 09-504
Before the Honorable Robert E. Gerber

MOTION OF LOAN SYNDICATIONS AND TRADING ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION L.L.C. FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF REHEARING EN BANC

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February 13, 2015

CORPORATE DISCLOSURE STATEMENTS

The Loan Syndications and Trading Association ("LSTA") has no parent corporation and no publicly held corporation has any ownership interest in LSTA.

The Clearing House Association L.L.C. ("The Clearing House") has no parent corporation. As a limited liability company, The Clearing House does not issue stock; no publicly held corporation owns 10% or more of its membership interests.

The Loan Syndications and Trading Association ("LSTA") and The Clearing House Association L.L.C. ("The Clearing House") (together, "Proposed Amici") respectfully move for leave to file a brief as amici curiae in support of the petition for rehearing en banc filed by Defendant-Appellee JPMorgan Chase Bank, N.A. The proposed brief addresses the importance of enforcing the terms of formal agreements, consistent with common-law principles of agency, in determining whether a third party is authorized by a principal to act on its behalf in the corporate loan syndication market. This issue is of substantial importance to Proposed Amici and their members, and Proposed Amici believe that the brief will assist the Court in deciding this matter.

LSTA is a financial trade association whose mission is to promote a fair, orderly, efficient, and growing corporate loan syndication market and to provide leadership in advancing and balancing the interests of all market participants, including institutional investors, banks, law firms, and service providers. LSTA seeks to foster cooperation and coordination among all loan market participants, to facilitate just and equitable market principles, and to inspire the highest degree of confidence among investors in corporate loan assets. As a nationwide group with members under the jurisdiction of virtually every federal court of appeals, LSTA has a unique interest in ensuring regularity and predictability throughout the

circuits, and especially in uniform rules that promote efficient bankruptcy administration.

Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing, and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer, and check-image payments made in the United States. See The Clearing House's web page at www.theclearinghouse.org.

As explained in the proposed brief, Proposed Amici believe that the Panel's decision will upset the reasonable expectations of participants in the loan syndication market by failing to enforce the express limitations, set forth in formal

agreements, on agents' authority to act on behalf of their principals. Principals should be entitled to rely on those express limitations, and the ability to do so is critical to the efficient functioning of the $2 trillion loan syndication market. In ruling to the contrary, the Panel decision sows unnecessary confusion and uncertainty in an area that depends on clarity to reduce costs, reduce risks, and generate benefits for participants and the public.

Proposed Amici are uniquely positioned to assist this Court in understanding the implications of the Panel decision for the loan syndication market and other banking and loan sectors. Proposed Amici therefore believe the attached brief will help this Court reach a decision on the pending petition.

Defendant-Appellee JPMorgan Chase Bank, N.A. has consented to this motion through counsel. Plaintiff-Appellant Official Committee of Unsecured Creditors of Motors Liquidation Company takes no position on this motion.

Respectfully submitted.

/s William J. Perlstein

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BRIEF FOR LOAN SYNDICATIONS AND TRADING ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION L.L.C. AS AMICI CURIAE IN SUPPORT OF REHEARING EN BANC

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STATEMENT OF IDENTITY, INTERESTS, AND AUTHORITY

This brief is filed by the Loan Syndications and Trading Association ("LSTA") and The Clearing House Association L.L.C. ("The Clearing House") (together, "Amici") in support of the Petition for Rehearing En Banc filed by Defendant-Appellee JPMorgan Chase Bank, N.A. ("JPMorgan").[1]

LSTA is a financial trade association whose mission is to promote a fair, orderly, efficient and growing corporate loan syndication market and to provide leadership in advancing and balancing the interests of all market participants, including institutional investors, banks, law firms and service providers. LSTA seeks to foster cooperation and coordination among all loan market participants, to facilitate just and equitable market principles, and to inspire the highest degree of confidence among investors in corporate loan assets. As a nationwide group with members under the jurisdiction of virtually every federal court of appeals, LSTA has a unique interest in ensuring regularity and predictability throughout the circuits, and especially in uniform rules that promote efficient bankruptcy administration.

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[1] Pursuant to Second Circuit Rule 29.1, undersigned counsel hereby confirms that (i) no party's counsel has authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (iii) no person or entity, other than LSTA and The Clearing House, made a monetary contribution to the preparation or submission of this brief. JPMorgan Chase Bank, N.A. is a member of LSTA and The Clearing House.

Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing, and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer, and check-image payments made in the United States. See The Clearing House's web page at www.theclearinghouse.org.

Amici have an abiding interest in the proper application of agency law to assess whether, and to what extent, principals have authorized third parties to act as their agents in the $2 trillion loan syndication market. Participants in that market invest according to—and in reliance on—agreements that carefully delineate the powers and authority of their agents. The Panel decision upsets the reasonable

expectations of those participants by devoting virtually no attention to the terms of the agreements that defined the authority granted to GM, JPMorgan, and their agents. As a result, the secured interests of GM's $1.5 billion Term Loan lenders have been terminated, without those lenders' knowledge or consent, even though the formal agreements defining the authority of GM, JPMorgan, and their counsel undisputedly never authorized the termination—a result that would not and could not have occurred but for the happenstance that JPMorgan also acted as Administrative Agent for a separate loan. By failing to give effect to the terms of those formal agreements in determining the scope of those agents' authority, the Panel decision injects unnecessary confusion and uncertainty into an area that depends on clarity to reduce costs, reduce risks, and generate benefits for participants and the public.

Rehearing en banc is necessary to reaffirm the proper application of long-standing agency principles, including reliance on the plain terms of formal agreements to govern and limit the scope of an agent's authorization to terminate financing statements on behalf of its principal. Particularly in light of this Circuit's role in the financial community, rehearing is warranted to avert the significant confusion and negative consequences portended by the Panel opinion.

ARGUMENT

I. THE EFFICIENT FUNCTIONING OF THE $2 TRILLION LOAN SYNDICATION MARKET HINGES ON ADHERENCE TO FORMAL AGENCY AGREEMENTS

A syndicated loan is offered by a group of lenders (called a syndicate) who together provide funds to a single borrower. Syndicated lending spreads the risk of borrower default across multiple lenders (such as banks) or institutional investors (such as insurance companies, mutual funds, endowments, or other fund managers and pension funds). The syndicated loan market is a key source of financing for many job-creating large and middle market companies in the United States. In 2014 alone, more than 3,600 syndicated loan transactions took place, involving loan volumes of over $2.1 trillion dollars.

Principal-agent relationships are an indispensable feature of the loan syndication market. Syndicated loans typically involve a lead bank or underwriter, known as the "administrative agent," that performs certain administrative tasks on behalf of the loan syndicate, including dispersing cash flows between the borrower and syndicate members. Syndicated loans can also involve a collateral agent (often the same bank that serves as administrative agent), which manages the collateral on the loan syndicate's behalf. To reduce costs and more efficiently address administrative requirements, parties in syndicated loan transactions also engage other agents and third-party service providers, including lawyers and filing services

who draft transaction documents and submit Uniform Commercial Code ("UCC") filings.

To provide clarity and limit confusion, lenders typically enter into formal agreements to circumscribe the authority granted to third-party agents to act on their behalf. Doing so is critical to the ability of syndicate lenders to limit the monitoring costs that otherwise would be required whenever a principal relies on a third party to act on its behalf. Massive transactions like the $1.5 billion Term Loan at issue in this case can involve thousands of pages of documents and numerous agents and intermediaries. If syndicate lenders cannot rely on the limits set forth in their formal agreements to restrict their agents' authority to act on their behalf, they will be forced to incur significant costs to monitor the conduct of their agents—thereby undermining the efficiency of the market while needlessly increasing the risks associated with those loans.

II. THE PANEL OPINION'S DISREGARD OF THE TERMS OF THE RELEVANT FORMAL AGREEMENTS CONTRAVENES SETTLED PRINCIPLES OF AGENCY LAW AND THREATENS SIGNIFICANT NEGATIVE CONSEQUENCES FOR SYSTEMATICALLY IMPORTANT FINANCIAL MARKETS

A. Agency Law Requires Enforcement Of The Limits On Agent Authority Imposed By Formal Agreements

As the Delaware Supreme Court explained, the effectiveness of termination statements under the UCC depends on whether the secured party authorized the filing. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v.*

JPMorgan Chase Bank, N.A., 103 A.3d 1010, 1014-1015 (Del. 2014). The UCC in turn explains that the scope of the agent's authority is determined according to longstanding and settled principles of agency law: "Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including … principal and agent, … supplement its provisions." U.C.C. § 1-103(b). And under those principles, the content of any formal agreement is a significant, if not dispositive, factor in defining the extent of an agent's authority.

As this Court explained decades ago, "'[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295 (2d Cir. 1984) (quoting *Restatement (Second) of Agency* § 1(1) (1958)). Thus, "the authority of an agent 'is the power of the agent to do an act or to conduct a transaction on account of the principal which, with respect to the principal, he is privileged to do because of the principal's manifestations to him.'" *Minskoff v. American Express Travel Related Servs. Co.*, 98 F.3d 703, 708 (2d Cir. 1996) (quoting *Restatement (Second) of Agency* § 7 cmt. a (1958)). An agent's "actual authority" is thus created and defined "by *direct manifestations* from the principal to the agent, and the extent of the agent's actual authority is interpreted in the light of all the circumstances attending these manifestations, including the customs of business,

the subject matter, *any formal agreement between the parties*, and the facts of which both parties are aware." *Demarco v. Edens*, 390 F.2d 836, 844 (2d Cir. 1968) (emphases added); *see also Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 455 (Del. 1982) ("The authorization of an agent is interpreted in light of the accompanying circumstances, including the relationship of the parties, general usage, and the method of doing business.").[2]

Thus, under settled law—on which market participants rely—the grant of authority and its extent must be determined based upon the circumstances surrounding the manifestations of assent by the principal, and "especially" by the content of formal written agreements. *Demarco*, 390 F.2d at 844. Through such formal arrangements, principals can expressly and clearly define the scope of an agent's authority. By doing so, the parties can reduce transaction costs, reduce the need for continued micromanagement of the agent's conduct by the principal, and reduce the risk that the parties' interests will be harmed by unauthorized acts of the agent.

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[2] *See also Restatement (Third) of Agency* § 2.01 cmt. c (2006) ("Actual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation."); *Sarkes Tarzian, Inc. v. U.S. Trust Co. of Fla. Sav. Bank*, 397 F.3d 577, 583 (7th Cir. 2005) ("A principal confers actual authority on his agent when he objectively manifests to the agent consent to the agency." (citing *Ojeni v. Lieber*, 759 N.Y.S.2d 453, 454 (N.Y. App. Div. 2003))).

B. By Discounting The Terms Of The Formal Agreements, The Panel Decision Creates Significant Uncertainty And Threatens The Efficient Operation Of The Loan Syndication Market

As the petition for rehearing explains (at 2-6, 7-12), the unambiguous terms of the agreements governing the Term Loan in this case made clear that (i) GM agreed to maintain the security interest in the Term Loan, and (ii) JPMorgan, as Administrative Agent for the Term Loan, could not authorize GM to "release all or substantially all of the Collateral from the Liens of the Security Documents without the written consent of each [Term Loan] Lender." A1877. The agreements governing the separate Synthetic Lease likewise conferred no authority—and could not have conferred authority—on GM, JPMorgan, or their agents to terminate security interests for other, unrelated loans. The terms of these agreements should have been dispositive.

The Panel decision, however, cast aside these formal, express limits on the agents' authority. Panel Op. 11-14. According to the Panel opinion, these agreements were irrelevant because "JPMorgan and its counsel knew that, upon the closing of the Synthetic Lease transaction, Mayer Brown was going to file the termination statement that identified the Main Term Loan UCC-1 for termination and … JPMorgan reviewed and assented to the filing of that statement." Panel Op. 14. That conclusion is wrong as a matter of law. JPMorgan, in its role as Administrative Agent for the Synthetic Lease, had no legal authority to act on the

Term Loan. Its failure, as Administrative Agent for the Synthetic Lease, to realize that one of the UCC-1 filing numbers listed in the Synthetic Lease payoff documents identified collateral unrelated to that transaction did not and cannot amend the scope of the authorization in the parties' formal agreements.[3]

That result would have been ineluctably clear had two different banks served as administrative agents of the two loans. In that situation, the fact that the administrative agent for the Synthetic Lease loan inadvertently approved a form that included the UCC number of a lien securing the separate Term Loan could not possibly have had legal effect. That JPMorgan happened to serve as administrative agent for both loans in this case should not have changed that result. Instead, having established clear limits on the authorization granted to GM in the Termination Agreement for the Synthetic Lease and under the Term Loan agreements, JPMorgan should have been entitled to rely upon those limitations in its dealings with its agents. As a result, its failure as Administrative Agent for the Synthetic Lease to "express any concerns" about "a Closing Checklist, draft UCC-3 termination statements, and an Escrow Agreement" for the Synthetic Lease,

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[3] Nor did Simpson Thacher's conduct authorize termination of the main security interest for the Term Loan. Simpson Thacher was not retained by JPMorgan to represent JPMorgan as Administrative Agent for the Term Loan. Panel Op. 12. Consequently, Simpson Thacher's comments on the Closing Checklist, draft UCC-3 termination statements, and the Escrow Agreement were outside the scope of Simpson Thacher's authority and cannot bind JPMorgan as Administrative Agent for the Term Loan.

Panel Op. 12-13, is not tantamount to authorization for GM to terminate security interests unrelated to the Synthetic Lease simply because JPMorgan happened to be the Agent for both loans—any more than if there had been two different agents. The purpose of formal agreements defining the scope of authorized conduct is to establish clear lines of authority through which the principal and agent can avoid duplication of effort and the principal can avoid the burdensome micromanagement of an agent's conduct. The Panel's contrary approach renders such agreements ineffective by allowing their terms to be modified through means other than the express modification of the formal agreement. Further, the Panel's approach would require a principal constantly to monitor and micromanage its agent's actions, in effect negating the benefits underlying the establishment of principal-agent relationships.

Rehearing en banc should thus be granted to ensure the uniformity and soundness of the Court's decisions in a proceeding involving questions of exceptional importance. *See* Fed. R. App. P. 35(a). Market participants require stable rules for making determinations about whether conduct by an agent was authorized by a principal. Formal agreements setting forth the scope of relevant authorization should remain the focal point of such determinations.

The Panel's decision to the contrary upsets settled principles of agency law and the reasonable expectations of market participants by failing to give effect to

the parties' agreements setting forth limits on the scope of the authorization granted to GM by JPMorgan as Administrative Agent for the Synthetic Leases. Although the Court long ago highlighted the importance of the terms of formal agreements between parties in assessing whether an agent has been granted relevant authority by a principal, *Demarco*, 390 F.2d at 844, the Panel decision deprives these agreements of much of their utility because they can be modified or negated through unchecked actions by careless, rogue, or otherwise unauthorized agents. *See* Panel Op. 12-14. Thus, even though the parties' agreements here made clear that they authorized action only with regard to the financing statements relating to the Synthetic Lease, and intended no such authorization with regard to the Term Loan, those express limits were deemed irrelevant to the Court's ultimate analysis. *See id.* at 14.

Without the certainty that their formal agreements will be enforced according to their terms, participants in the syndicated loan market will be compelled to either incur substantial additional monitoring costs or limit the authority of their agents to take any actions on their behalf. Either outcome would undermine the efficient operation of the market, while increasing the costs and risks associated with these loans.

CONCLUSION

For these reasons, Amici respectfully request that rehearing en banc be granted.

Respectfully submitted.

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