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August 26, 2022

VIA OVERNIGHT COURIER
Lisa A. LeCours
Chief Clerk & Legal Counsel
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Favourite Limited, et al. v. Cico, et al. APL-2022-00102
APPELLANTS' JURISDICTIONAL RESPONSE

Dear Ms. LeCours:

Pursuant to this Court's Rule of Practice 500.10, Appellants make this letter submission comprising their Jurisdictional Response as requested by the Court's letter of August 8, 2022 ("August 8 Letter").

This Court's jurisdiction derives from the New York State Constitution Article 6 Section 3 and CPLR Article 56. Specifically, jurisdiction in this appeal is authorized by CPLR §5601(a) by reason of Presiding Justice Acosta and Justice Moulton of the Appellate Division, First Department, dissenting, in favor of Appellants, from the decision and order appealed from ("Decision and Order"), on questions of law, which decision and order finally determines the action.

This Court's August 8 Letter specified that the aspect of Court of Appeals subject matter jurisdiction to be addressed is "whether the order appealed from finally determines the proceeding within the meaning of the Constitution." Accordingly, the paragraphs to follow examine the issue of finality with respect to the Decision and Order.

"The threshold issue in any finality inquiry is to identify the paper whose finality is to be considered. By statute, that paper is the order of the appellate division." Scheinkman, *The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality* 54 St. John's L. Rev. 443, 455 (1980). The relevant statute is CPLR §5512.

Section 5512(a), titled "Appealable Paper," provides that "An initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is sought to be reviewed." "Thus, it is the order of the appellate division, and not any subsequent judgment or order, that must be studied in order to determine if the finality requirement has been satisfied." Scheinkman, *supra*, 54 St. John's L. Rev. at 456.

Assessment of the finality of appellate division orders begins with CPLR §5611:

> "When appellate division order deemed final. If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. If the aggrieved party is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his having performed it."

Here, the Decision and Order disposes of all the issues in the action:

- With respect to Plaintiffs' claims, its majority opinion holds that it "has already ordered the complaint dismissed" because Plaintiffs "lacked capacity or standing to act" and that "the trial court lacked discretion to grant plaintiffs leave to amend a complaint that had already been dismissed by this Court." Decision and Order at 2.

- With respect to Defendants' counterclaims, the Decision and Order affirms the trial court's dismissal of all counterclaims. By Order dated June 8, 2021, the trial court "ORDERED that plaintiffs' motions to dismiss the counterclaims are GRANTED and that the Cicos' counterclaims are dismissed." Appellants' Preliminary Appellate Statement Ex. 4 at 3. The Decision and Order affirms the trial court's dismissal.

- The Decision and Order grants no "leave to replead or to perform some other act which would defeat finality." CPLR §5611. To the contrary, it reverses leave to replead, makes no order or condition or remand of any kind, and directs no further action or deadline for the parties. Having dismissed Plaintiffs' complaint and Defendants' counterclaims, the Decision and Order has plainly "dispose[d] of all the issues in the action [and therefore] its order shall be considered a final one." CPLR §5611; Scheinkman, *supra*, 54 St. John's L. Rev. at 458 n.81 ("Appellate division orders that have the effect of terminating the litigation as to all or even some of the causes of action have been held final.") (citations omitted).

- Indeed, since the Decision and Order was issued on June 21, 2022, no party has made any application or motion nor taken any kind of action whatsoever in the trial court or the appellate division, other than to file this appeal. No proceeding is pending or scheduled in the trial court or in the appellate division and the Decision and Order directs none.

Respondents have not made known to us their position on finality, nor any arguments they may seek to advance concerning it. We are left to speculate.

Respondents may have in mind to insist that the Decision and Order is not final because they might in the future apply to the trial court for an award of prevailing party attorney's fees. Such an assertion would be specious.

First, no party has made any such an application and nothing is pending anywhere other than this appeal. That is because such an application would be meritless for numerous reasons, any one of which would be sufficient for its rejection. Most obviously, neither side is a prevailing party because under the express terms of the Decision and Order, each side's claims and counterclaims have all been dismissed. Moreover, the contractual clause for prevailing party attorney's fees in the parties' Operating Agreement provides for recovery of fees only where the party bringing claims prevails, not where the party defending claims prevails (App. Div. Record at 102-103) and under the Decision and Order, neither side bringing claims prevails on them. In addition, Respondent Benedetto Cico's Answer has not even asserted a prayer for relief for prevailing party attorney's fees, only a counterclaim, which has now been dismissed. App. Div. Record at 164-224.

Second, the theoretical prospect of a future application to the trial court, and a meritless one at that, cannot form the basis of an argument against the finality of an order that terminates the litigation as to all claims and parties. Any other rule would make finality impossible to achieve in cases of dismissal because such a theoretical prospect always exists. What's to stop a party from evading review in this Court by simply announcing a future intention to apply for attorney's fees, under a statute, a contract, or even simply under NYCRR §130 or other rule against frivolous or bad faith litigation conduct? There is no deadline for such applications. Can their mere possibility transform an otherwise clearly final order into a non-final one within the meaning of the Constitution? If so, a final order of dismissal could effectively be made unreviewable in this Court.

Third, this action is thus nothing like, for example, *Burke v. Crosson*, 85 N.Y.2d 10 (1995), in which the matter of statutory attorney's fees was expressly litigated and addressed by the orders appealed from. There, the trial court granted the application for attorney's fees in the same order that it granted summary judgment, and set the matter down for a hearing to calculate them. *Id*. at 14 ("The court also granted plaintiff counsel fees pursuant to 42 U.S.C. §1988, but postponed assessment pending a hearing"). The appellate division expressly reviewed on appeal a subsequent order awarding a specified sum for counsel fees, vacating and remanding it for recalculation. *Id*. This Court held that the original trial court order was non-final because it had yet to address the open the matter of fixing the amount of the attorney's fees that it had granted. *Id*. at 17-18. Thus, *Burke* offers no support for Respondents where, as here, no court has entertained an application for prevailing party attorney's fees, because no application for fees has ever been made, and indeed no basis exists for one. These circumstances cannot deprive the Decision and Order dismissing all claims against all parties of its finality for purposes of appeal to this Court.

Fourth, finality for purposes of Court of Appeals subject matter jurisdiction "has usually been given a pragmatic interpretation." Siegel, *New York Practice* §527. Where dismissal, rather than judgment for a claimant, is the ruling, it is difficult to imagine an appellate division order more final than the Decision and Order here. It: (1) dismisses the entire complaint, (2) reverses a grant of leave to amend it, and (3) affirms the dismissal of every counterclaim of each Defendant. There are any number of potential post-dismissal motions or applications still available to a party aggrieved or benefitted by a dismissal. Examples include CPLR 2221 motions to renew for newly discovered facts, taxing of costs including attorney's fees, CPLR 5015 motions for relief from an order, 22 NYCRR 216.1 motions to seal court records, the list goes on. These acts are not merely ministerial,

yet their hypothetical prospect has never been held to render a final order non-final.

In sum, where, as here, the order appealed from dismisses all claims of all parties and directs no further proceedings, the mere prospect of a future application for some kind of relief by a respondent hoping to evade review in this Court does not deprive this Court of subject-matter jurisdiction.

Kindly be advised that Appellants have submitted their Rule 500.1(f) disclosure statement as Exhibit 7 to their Preliminary Appeal Statement, previously filed with this Court.

Respectfully,

/s/

PETER JAKAB

cc: Edward Toptani, Esq.
Sean Kemp, Esq.