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VIA OVERNIGHT MAIL
AND PORTAL E-FILING

State of New York Court of Appeals
Attn: Hon. John P. Asiello
Chief Clerk and Legal Counsel to the Court
20 Eagle Street
New York, NY 10075

Re: *Cortlandt Street v. TPG Capital, et al.*, Case No. APL-2022-00006 (Jurisdictional Response)

Dear Mr. Asiello:

The Court of Appeals has ordered Proposed Intervenor-Appellant-Respondent Basil Vasiliou ("Appellant") to justify the subject matter jurisdiction of his appeal. Subject matter jurisdiction here is proper under CPLR 5601(b)(2), the appeal is from the judgment of a court of original instance, and the court finally determined an action where the only question involved on the appeal is the validity of a statutory provision of the United States under the constitution of the United States.

1. The Underlying Appeal

The appeal is from an order of the Supreme Court, New York County, dated October 22, 2020 (the "Order"). The Order ruled that the claims of a class of noteholders were barred by expiration of the statute of limitations and ordered that the motion to intervene of Appellant was denied. The motion was made to intervene to replace the original class representative Plaintiff Cortlandt Street Recovery Corp. ("Cortlandt"). The putative class is of noteholders of promissory notes issued by Hellas Telecommunications II S.C.A. ("Hellas II") totaling $1.42 billion ("Notes").[1]

In March 2017, Cortlandt commenced a class action (the "Class Action") on behalf of holders of the Notes (the "Sub Noteholders"). In 2019, Cortlandt had a conflict of interest and moved to discontinue the Class Action by amending the Class Action complaint and withdrawing all class allegations. Appellant opposed the motion to discontinue and moved to intervene to replace Cortlandt as class representative and pursue the Class Action for Class Members. There was no hearing or oral argument on either motion.

[1] The Sub Notes were issued for €960 million and $275 million. Converting to dollars and totaling equals $1.42 billion.

The Order dismissed the class claims, denied Appellant's motion to intervene and granted Cortlandt's motion to amend the Class Action Complaint to be a complaint for Cortlandt only. The IAS Court dismissed all class claims on the basis that the issuer of the Notes defaulted, which triggered an acceleration making all amounts immediately due. This occurred in November 2009. Cortlandt filed the Class Action Complaint in March 2017, almost eight years later. The IAS Court concluded that statute of limitations was six years and the Class Action was untimely under CPLR 203(a)'s six-year statute of limitation.

The IAS Court erred because there is a federal statute, the Trust Indenture Act of 1939 ("TIA") which provides that individual noteholders in trust indentures incorporating the TIA accrue a claim to sue for payment of interest and principal on the due dates in the notes. The federal statute governs the Class Claims not New York law. Section 6.07 of the indenture for the Sub Notes (the "Indenture") is § 316(b) of the TIA and guarantees absolutely and unconditionally to individual Sub Noteholders that a claim will accrue to them on dates certain in the Sub Notes.

The IAS Court erred in concluding that the statute of limitations had expired when this Class Action commenced in March 2017 based on the default and acceleration in November 2009, eight years earlier. Section 6.07 is not affected by a default or acceleration because of TIA § 316(b). Because the TIA is a federal statute pursuant to the Supremacy Clause it is the law of the land.

2. Section 316(b) of the Trust Indenture Act of 1939 is a Valid Statutory Provision of the United States Under the Constitution of the United States Granting the Right to a Noteholder to Receive Payments on the Due Dates in the Note, Accruing on those Dates and Enforced by Litigation, a Right that "Shall Not be Impaired".

Conflicts between state and federal statutes are to be anticipated and the federal statutory provisions takes precedence, they are the "supreme law of the land". *See* Supremacy Clause, U.S. Constitution, Art. VI, Cl. 2. *See also Rose ex rel. Clancy v. Moody*, 83 N.Y.2d 65, 72 (1993) ("Where a federal statute facially clashes with a State statute, the Federal statute must triumph."); *State ex re. Grupp v DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012) (granting leave to appeal, and pursuant to the Supremacy Clause, enforcing regulatory aspects of a federal fraudulent claim statute; *Doomes v. Best Tr. Corp.*, 17 N.Y.3d 594 (2011) (granting leave to appeal, and pursuant to the Supremacy Clause, determining the preclusive limitations of the federal automobile seatbelts).

The Notes were issued under the Indenture which incorporates TIA § 316(b). (A547, A612.)[2] Hellas II defaulted on its payments of interest when it failed to pay a quarterly interest payment on October 15, 2009. (A59 at ¶ 92.) The failure to pay quarterly interest continued until the principal due on the Sub Notes ($1.42 billion) matured for payment on January 15, 2015. (A625, A638, A653, A665.) Accounting for contractual and statutory prejudgment interest, the total amount due on the Sub Notes is $3.1 billion.

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[2] "A__" refers to the Joint Appendix filed in this Appeal. *See* ECF Docs. 6, 8. "ECF Doc. __" refers to documents on the First Department's docket.

Section 6.07 of the Indenture grants Sub Noteholders the right to receive payment of principal and interest on the Sub Notes "on or after the respective due dates expressed in the Note. . . or to bring suit for the enforcement of any such payment on or after such respective dates." (A600.) Section 6.07 is clear: the rights it creates may not be accelerated by one or more defaults in the payment of interest or anything else unless Sub Noteholders consent. Section 6.07 states:

> *Notwithstanding any other provision* of this Indenture, the right of any Holder of a Note to receive payment of principal, premium, if any, and interest on the Note, on or after the respective due dates expressed in the Note (including in connection with an offer to purchase), or to bring suit for the enforcement of any such payment on or after such respective dates, *shall not be impaired or affected without the consent of such Holder*....

(*Id.* (emphasis added).)

TIA Section 316(b), the source of § 6.07, is clear:

> (b) *Prohibition of impairment of holder's right to payment. Notwithstanding any other provision* of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, *shall not be impaired or affected without the consent of such holder*....

15 U.S.C. § 77ppp(b) (emphasis added). The unconditional right to payment under § 6.07, which tracks a right codified in § 316(b) of the TIA, is a standalone right for Sub Noteholders that "overrides any conflicting provisions" in the Indenture or any conflict with New York law under the Supremacy Clause.

In *Brady v UBS Fin. Servs.*, 538 F.3d 1319, 1323 (10th Cir. 2008), the court explained that allowing an acceleration clause in an indenture to impair an individual noteholders' right to sue post-maturity would be contrary to the TIA ¶ 316(b). In *Brady*, the plaintiff claimed the terms of an indenture gave him an unconditional right to sue on the fixed date of maturity printed on his bond, regardless of the acceleration of the debt. The court agreed and explained: The plain language of § 316(b) demonstrated that Brady did have an unconditional right to sue on the stated maturity of his bond. The provision clearly states that there is an absolute right to payment on the stated maturity and an individual right to sue for such payment. *Id.* at 1325.

Brady is a recent decision on point. The right of individual noteholders to receive payment on the dates in a bond or note which incorporates the TIA has a long history. It goes back to the Nineteenth Century and from 1939 and the TIA states the rules. Under TIA rules, individual noteholders have no right to sue the issuer of the notes, not until the maturity date. Only an indenture trustee has that right. *See Batchelder v Council Grove Water Co.*, 131 N.Y. 42 (1892) (claims for accelerated amounts are a collective right and therefore can only be enforced by the trustee pre-maturity); *Watson v Chicago, R. I. & P. R. Co.*, 90 Misc 388, 389 (1st Dep't 1915)

("While unquestionably the holder of one of the bonds would have a right to bring action to recover past due interest…no provision is made in the bond that upon default of interest the principal shall become due at the election of the holder of the bond. On the contrary the bond provides [that] … the right to elect that the principal shall become due before … the stipulated due date, is, by the trust agreement, limited to the trustee. Plaintiff has … no cause of action, as an individual holder, to recover the principal of the bond before the year 2002 [the stated maturity date]…."); Lee C. Buchheit, *"Trust Indentures and sovereign: who can sue?* Journal of International Business and Law, 8 JIBFL 457 (2016) ("Under a US trust indenture, a bondholder can sue individually for matured amounts (for missed payments due on a regularly scheduled maturity date) … [and] … A bondholder will not be able to bring an individual action to recover its share of accelerated amounts; that power is lodged with the indenture trustee.").

3. Class Claims Barred by the Statute of Limitations, that is Finality.

Based on the foregoing, subject matter jurisdiction exists under CPLR 5601(b)(2) because the appeal is from the Order which finally determined the action for all Class Members – all Class Claims are dismissed – the finality is the result of the IAS Court's rejection of the validity of § 316(b) of the TIA which is a statutory provision of United States and must be enforced under the Supremacy Clause. The Court of Appeals has subject matter jurisdiction.

Respectfully,

Jared Stamell /JBS

Jared B. Stamell

cc: Paul M. O'Connor, III
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