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February 23, 2022

Via Hand Delivery and Court-PASS

State of New York Court of Appeals
Attn: John P. Asiello
Chief Clerk and Legal Counsel to the Court
20 Eagle Street
Albany, New York 12207

Re: *Cortlandt Street v. TPG Capital et al.*, APL-2022-00006

Dear Mr. Asiello:

We represent Respondents (the "TPG-Related Parties") in the above-referenced appeal (the "Appeal"). We write in response to the Court's January 26, 2022 letter requesting that the parties address: (1) whether the order appealed from "finally determines the action within the meaning of the Constitution"; and (2) whether there is a "substantial constitutional question" that is "directly involved to support an appeal as of right" under CPLR 5601(b)(1). As agreed by the parties and approved by the Court, this letter responds to the letter from Vasiliou to the Court dated February 14, 2022 (the "Vasiliou Letter"), which only asserts arguments purportedly to support the Court's jurisdiction under CPLR 5601(b)(2), and fails to address the Court's questions regarding CPLR 5601(b)(1).

For the reasons discussed below, the Court should dismiss the Appeal because there is no subject matter jurisdiction under either CPLR 5601(b)(1) or (b)(2).

I. Background and Summary

The Vasiliou Letter asserts that the IAS Court erred in denying Vasiliou's motion to intervene as putative class counsel based on its conclusion that the statute of limitations for all claims relating to the issuer's failure to pay the notes at issue accrued under New York law in 2009, when the notes defaulted. Vasiliou contends that the Trust Indenture Act ("TIA"), a federal statute, governs the notes and that the TIA requires that claims brought by individual noteholders accrue on the maturity of the notes notwithstanding their acceleration upon default, and that the TIA is the "supreme law of the land" under the Supremacy Clause of the U.S. Constitution. *Id.* at 2 (citing U.S. Const. Art. IV, cl. 2). On these grounds, Vasiliou contends

that his motion to intervene should have been granted because the putative class claims were not time-barred. *Id.* Vasiliou's arguments should be rejected for multiple reasons including that, as a threshold matter, the TIA does not govern the notes, and the U.S. Constitution does not apply to contractual claims for nonpayment resolved under a direct and straightforward application of New York law.[1] In addition, Vasiliou's assertion that the order appealed from is a final determination that provides the Court with jurisdiction, *id.* at 4, is meritless.

In his Notice of Appeal, Vasiliou confusingly refers to both the appeal of the IAS Court's decision denying his motion to intervene (the "Intervention Order," IAS Ct. Dkt. 140) and the appeal of the dismissal of his appeal by the Appellate Division, First Department (1st Dep't Dkt. 26) (the "Dismissal Order") in the Notice of Appeal filed with the IAS Court (Dkt. 272) (the "Notice of Appeal"). As a result, it is unclear which decision is the subject of the Appeal and on which grounds Vasiliou seeks to appeal. Because Vasiliou appealed the IAS Court decision to the First Department and not directly to this Court, and the time to file a direct appeal of the IAS Court's October 22, 2020 order denying his motion to intervene has long since expired, the Appeal should be considered as an appeal from the Dismissal Order only, and should be dismissed for lack of jurisdiction as provided herein.[2]

II. Vasiliou has Waived any Constitutional Predicates for Jurisdiction Under Either CPLR 5601(b)(1) or (b)(2)

CPLR 5601(b)(1) and (b)(2) provide appellants with jurisdiction in this Court as of right under very limited circumstances, in cases involving constitutional construction of the State or U.S. Constitutions, or that question the constitutional validity of a State or U.S. statute. Notwithstanding the Court's specific request for briefing on the applicability of CPLR 5601(b)(1), the Vasiliou Letter does not address that provision at all. By failing to do so, Vasiliou has waived any argument that CPLR 5601(b)(1) should apply to this case.

Additionally, Vasiliou waived his right to raise a Supremacy Clause argument under CPLR 5601(b)(1) or (b)(2) because Vasiliou *never raised any constitutional issue* in the underlying briefing in support of his motion to intervene before the IAS Court. (IAS Ct. Dkt. 122-23, 127). And although his appeal brief in support of his appeal of the Intervention Order to the First Department references a "constitutional right to be heard," and mentions "due process" as does his opposition to the motion of the TPG-Related Parties to dismiss the appeal (which was

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[1] Vasiliou asserted in his Notice of Appeal that the Appeal concerns "the validity of a statutory provision of the United States Constitution, to wit Section 316(b) of the Trust Indenture Act of 1939 . . . ." and a decision by the IAS Court wrongfully "adjudging that the accrual of class member' claims were governed by state law in violation of Article VI, Paragraph 2 of the U.S. Constitution." Notice of Appeal at 1. This makes no sense. To the extent the Appeal relates to the validity of the TIA, the TIA is plainly a federal statute, not a provision of the United States Constitution. And to the extent the Appeal relates to a federal statute, rather than a state statute, the Appeal does not in any way involve constitutional construction.

[2] Notice of Entry of the Intervention Order was served on November 2, 2020. (IAS Ct. Dkt. 143). Vasiliou noticed an appeal of the Intervention Order to the First Department on December 1, 2020, the last day to do so. (IAS Ct. Dkt. 146); *see* CPLR 5513(a). The time has long passed for Vasiliou to seek a direct appeal in this Court.

granted), neither filing references the Supremacy Clause of the U.S. Constitution – or for that matter, any other constitutional provision. (1st Dep't Dkt. 9 at 21-24; 19 at 22-24). Given Vasiliou's failure to raise the constitutional question in the IAS Court, there is no constitutional question, let alone a substantial constitutional question, for this Court to review. *See Schulz v. State*, 81 N.Y.2d 336, 344 (1993) ("Because plaintiffs did not expressly allege voter standing in the proceeding underlying Schulz Appeal No. 2, no substantial constitutional question is presented and we thus dismiss that appeal . . . ."); *In re Shannon B.*, 70 N.Y.2d 458 (1987) (dismissing appeal where Appellate Division "did not explicitly address the constitutional argument upon which appellant hinges her appeal as of right to this court" and the issue was "first raised on appeal at the Appellate Division"); *Edde v. Columbia Univ. in the City of New York*, 5 N.Y.2d 881, 882 (1959) (dismissing appeal asserting due process and freedom of speech violations for the first time at the Court of Appeals).[3]

III. The Court of Appeals Lacks Jurisdiction Under CPLR 5601(b)(1).

An appeal taken pursuant to CPLR 5601(b)(1) requires that the appeal be from "an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States," and the constitutional issue raises a "substantial question." *See, e.g., In re Law Firm of Daniel P. Foster, P.C.*, 67 N.Y.2d 828 (1986) (dismissing appeal where no "substantial question" was directly involved). Vasiliou fails to satisfy either requirement.

First, the Dismissal Order did not "finally determine an action." Instead, it dismissed as academic Vasiliou's appeal from the IAS Court's denial of his motion to intervene after plaintiff Cortlandt Street Recovery Corp filed an amended complaint without class allegations (IAS Ct. Dkt. 214). Dismissal Order at 2. The action continues to be litigated in the IAS court and as a result, has not been "finally determined." *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995) ("[A] 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters.") (citation omitted).

Second, the Dismissal Order did not directly involve the construction of the U.S. Constitution or of the New York Constitution. Instead, the question for the First Department was whether an appeal of the denial of a motion to intervene in an action premised upon an initial complaint was rendered academic by the filing of an amended complaint. Notwithstanding Vasiliou's attempt to raise vague constitutional issues at the First Department for the first time,

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[3] Additionally, the Notice of Appeal is defective and untimely, and therefore, this Court lacks jurisdiction. Specifically, the Dismissal Order in the First Department was entered on November 4, 2021, with notice of entry filed by the TPG-Related Parties on November 10, 2021. (IAS Ct. Dkt. 262). Notice of Appeal at 1. The clerk of the IAS Court rejected the Notice of Appeal on December 9, 2021, leaving Vasiliou one day to correct the notice before expiration of the 30-day period to appeal under CPLR 5513(a), but he failed to do so. This failure to file a timely and proper Notice of Appeal precludes this Court from considering jurisdiction under CPLR 5601. *See, e.g., Jessica W. v. Admin. for Child Servs. (In re Baby Boy W.)*, 35 N.Y.3d 976, 977 (2020) (dismissing appeal as untimely for failure to comply with CPLR 5513(a) and, alternatively, on the grounds that it lacked jurisdiction under CPLR 5601(b)), *reargument denied,* 35 N.Y.3d 1105).

(1st Dep't Dkt. 9 at 21-24; 19 at 22-24), the Dismissal Order did not address them. Therefore, there is no issue of constitutional construction for this Court to consider under CPLR 5601(b)(1), which precludes the Court's jurisdiction. *See Twin Coast Newspapers, Inc. v. State Tax Comm'n*, 64 N.Y.2d 874, 876 (1985) (finding no substantial constitutional question existed under CPLR 5601(b)(1) where issue could be resolved by statutory interpretation).

IV. The Court of Appeals Lacks Jurisdiction Under CPLR 5601(b)(2).

CPLR 5601(b)(2) requires an appeal to be from a "*judgment* of *a court of record of original instance* which *finally determines an action* where *the only question involved on the appeal* is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States." (emphasis added). This provision does not apply here for multiple reasons.

First, as noted in footnote 2, *supra*, the Appeal cannot be a direct appeal from the IAS Court (the court of original instance), because an appeal from the October 2020 Intervention Order would be untimely.

Second, CPLR 5601(b)(2) does not apply because the Intervention Order was not a "judgment," let alone one that "finally determines an action." Vasiliou's false statement in his defective Notice of Appeal that the Intervention Order "adjudge[ed] that the accrual of class member' claims were governed by state law in violation of Article VI, Paragraph 2 of the U.S. Constitution," Notice of Appeal at 1-2, does not change this. Instead, the IAS Court issued an interlocutory order in an action that continues to be litigated in the IAS Court. The Vasiliou Letter conveniently fails to mention that after the October 2020 Intervention Order, which also granted defendants' motion to dismiss, on March 22, 2021, the IAS Court issued another order that granted the plaintiff's motion for leave to file an amended complaint (IAS Ct. Dkt. 208), which was filed on April 5, 2021. (IAS Ct. Dkt. 214). Therefore, there has been no final determination of the action. *Burke*, 85 N.Y.2d at 15 ("[A] 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters.") (citation omitted).

Third, it is not the case that the "only question" on this appeal is the constitutional validity of a state or federal statute. Indeed, there is *no question* regarding the constitutional validity of a statute, let alone a "substantial question" as is required. *See, e.g.*, *Foster*, 67 N.Y.2d 828 (dismissing appeal where no "substantial question" was directly involved). As noted in Section II, *supra*, the Intervention Order does even reference interpretation of the United States Constitution, because Vasiliou never made such an argument. Instead, the only question concerning the IAS court's denial of the motion to intervene is whether, under basic principles of New York contract law, the statute of limitations expired on Vasiliou's breach of contract claims before he sought to intervene in the action. *See Twin Coast Newspapers*, 64 N.Y.2d at 876 (no substantial constitutional question existed under CPLR 5601(b)(1) regarding applicability of the First Amendment to prevent taxation of state tax reports, where issue could be resolved by statutory interpretation).

Vasiliou seeks to manufacture an argument that the Supremacy Clause of the U.S. Constitution somehow precluded the IAS Court from denying his motion to intervene, based upon the purported applicability of the TIA, even though the Supremacy Clause was never raised below and the TIA was not raised until Vasiliou's First Department briefing. (IAS Ct. Dkt. 122-23, 127) (no reference to TIA); (1st Dep't Dkt. 9 at 1-5, 12-20). Vasiliou's attempt is meritless.

He first argues that the notes at issue "were issued under the Indenture which incorporates TIA § 316(b)." Vasiliou Letter at 2 (citing IAS Ct. Dkt. 74 at 30, 95). However, the Indenture is not "qualified" under the TIA because the notes were entirely issued in a private placement. As a result, the TIA does not apply. *Tennenbaum Living Tr. v. TGLT S.A.*, No. 20 CIV. 6938 (JPC), 2021 WL 3863117, at *4-5 (S.D.N.Y. Aug. 30, 2021) (private placements were not "qualified" and were exempt from the TIA, and such indentures therefore were governed by "basic contract law") (quoting *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 39 (2018)). Instead, as properly held by the IAS Court the Indenture is governed by New York law pursuant to a choice of law provision, and by its express terms the TIA is not applicable. (IAS Ct. Dkt. 74 at 102) (Indenture § 14.08) (providing that new York law governs). Vasiliou's cases cited to support application of the Supremacy Clause here are entirely inapposite.[4]

In support of his false assertion that the Indenture "incorporates TIA § 316(b)," Vasiliou Letter at 2, Vasiliou cites several provisions of the Indenture, none of which support his claim. Vasiliou first cites to section 1.03, which states that "[w]*herever this Indenture refers to a provision of the TIA*, the provision is incorporated by reference in and made a part of this Indenture, as if this Indenture were required to be qualified under the TIA." (IAS Ct. Dkt. 74 at 30) (Indenture § 1.03) (emphasis added). Most significantly, section 6.07 of the Indenture, which Vasiliou claims governs the accrual of his breach of contract claims, does *not* refer to the TIA. *Id.* at 83 (Indenture § 6.07). Accordingly, the construction of section 6.07 is governed by New York law, as recognized by the IAS Court, Intervention Order at 27-29, and not the TIA. At *most*, a court might look to section 316(b) of the TIA to aid its interpretation of section 6.07 of the Indenture *under New York law*. *CNH Diversified Opportunities Master Acct., L.P. v. Cleveland Unlimited, Inc.*, 36 N.Y.3d 1, 10 (2020).

Vasiliou's citation to section 9.03 of the Indenture is similarly unavailing. This section provides that "[e]very amendment or supplement" to the Indenture will comply with the TIA. (IAS Ct. Dkt. 74 at 95) (Indenture § 9.03). Section 6.07 is not (and is not alleged to be) an

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[4] As Vasiliou recognizes, *State ex re. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278 (2012) and *Doomes v. Best Tr. Corp.*, 17 N.Y.3d 594 (2011) are leave to appeal cases, not CPLR 5601 cases. And in both cases, issues of constitutionality or federal preemption were raised by the parties or the lower courts prior to the appeal to this Court. In *Rose ex rel. Clancy v. Moody*, 83 N.Y.2d 65 (1993), which also did not involve CPLR 5601, the Court found that a New York family support statute enacted pursuant to a federal enabling statute was preempted by the federal statute. Unlike the statute at issue in *Clancy*, the TIA does not preempt New York's contractual statute of limitations. *See Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 172 F. Supp. 3d 700, 708 (S.D.N.Y. 2016) ("Violations of the TIA are subject to New York's six-year contractual statute of limitations") (citing *Cruden v. Bank of N.Y.*, 957 F.2d 961, 967 (2d Cir.1992)).

"amendment or supplement" to the Indenture. Thus, section 9.03 also does not support Vasiliou's assertion that section 6.07 incorporates section 316(b) of the TIA.

In short, Vasiliou misrepresents the contents of the Indenture and argues, incorrectly, that the TIA, not New York contract law, governs the interpretation of the Indenture, despite the express language of the contract. That argument does not turn on the constitutional validity of the TIA or any other statute, and further supports the inapplicability of CPLR 5601(b)(2) here.[5]

For the foregoing reasons, the Appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

Paul M. O'Connor III

cc: All counsel of record

[5] The cases cited by Vasiliou for the proposition that the TIA trumps New York's contractual statute of limitations under the Supremacy Clause are readily distinguishable. Two of the cases are well over 100 years old, do not discuss the U.S. Constitution, and pre-date the passage of the TIA in 1939 by decades. *See Batchelder v. Council Grove Water Co.*, 131 N.Y. 42, 46 (1892); *Watson v. Chicago, R.I. & P.R. Co.*, 90 Misc. 388, 389 (App. Term 1915). The Tenth Circuit case cited by Vasiliou, *Brady v. UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1323 (10th Cir. 2008), also contains no discussion as to constitutionality and fails to support any argument that the TIA preempts New York's statute of limitations under the Supremacy Clause. Indeed, that case held that the Oklahoma statute of limitations governed. 538 F.3d 1319, 1323-24 (10th Cir. 2008). The law journal article cited by Vasiliou is similarly irrelevant and contains no discussion of the Supremacy Clause. *See* Lee C. Buchheit, "Trust Indentures and sovereign: who can sue?" Journal of International Business and Law, 8 JIBFL 457 (2016). In fact, federal courts in the Second Circuit reviewing claims under the TIA apply a six-year statute of limitations. *See Phoenix*, 172 F. Supp. at 708 ("Violations of the TIA are subject to New York's six-year contractual statute of limitations.").

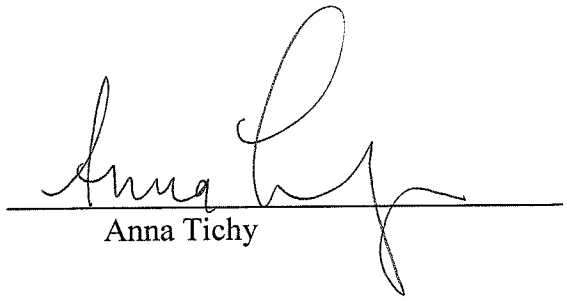
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

CORTLANDT STREET RECOVERY CORP., Plaintiff-Respondent, - against - TPG CAPITAL MANAGEMENT, L.P., DAVID BONDERMAN, JAMES COULTER, TPG GENPAR IV, L.P., TPG PARTNERS IV, L.P., TPG ADVISORS IV, INC., T3 GENPAR II, L.P., T3 PARTNERS II, L.P. and T3 PARALLEL II, L.P., Defendants-Respondents-Appellants, - and - APAX PARTNERS LLP, APAX EUROPE VI GP, L.P., APAX PARTNERS EUROPE MANAGERS LTD., APAX WW NOMINEES LTD., APAX PARTNERS, L.P., APAX EUROPE VI-A, L.P., APAX EUROPE VI-I, L.P. and APAX EUROPE VI GP CO. LTD., Defendants, - and - BASIL VASILIOU, Proposed Intervenor-Appellant-Respondent.	Appellate Division Case No.: 2020-04805 New York County Index No. 651176/2017

I, Anna Tichy, an attorney duly admitted to practice in the court of the State of New York, hereby affirm as follows under penalty of perjury pursuant to CPLR 2106, that on February 23, 2021, I caused to be served a true and correct copy of the TPG-Related Parties' Jurisdictional Letter to the Court of Appeals in the Appeal captioned *Cortlandt Street v. TPG Capital et al.*, APL-2022-00006 by depositing the same enclosed in a sealed wrapper in an official depository under the exclusive care, custody, and control of FEDEX via Priority Overnight mail within New York State, upon counsel to Appellant Basil Vasiliou, Stamell & Schager, LLP, attn.: Jared B. Stamell

and Andrew R. Goldenberg, Of Counsel, 260 Madison Avenue, 16th Floor New York, New York 10016.

Dated: New York, New York
February 23, 2022



Anna Tichy