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January 18, 2022

The Honorable John P. Asiello  
Clerk of the Court  
New York Court of Appeals  
20 Eagle Street  
Albany, New York 12207-1095

Re: *People v. Allen*, Nos. 2020-01772, 2020-03705, 2021-00701,  
2021-00726, 2021-00942, 2021-01699 (1st Dep't)

Dear Mr. Asiello:

I write on behalf of the New York State Office of the Attorney General (OAG) in response to this Court's January 6, 2022, letter inviting the parties to comment on its subject-matter jurisdiction. Because the Appellate Division order below neither finally determines the underlying action nor directly presents a substantial constitutional question, this Court lacks jurisdiction and should dismiss the appeal. *See* C.P.L.R. 5601(b)(1).

As explained in further detail in OAG's opposition to defendants' pending motion for leave to appeal (*see* Mem. of Law in Opp'n to Mot. for Lv. to Appeal ("Leave Opp.") at 1-6), defendants challenge the First Department's unanimous affirmance of a judgment finding that OAG had proven that defendants engaged in repeated acts of misconduct constituting securities fraud under New York's Martin Act and Executive Law § 63(12) and breaches of their fiduciary duties to investors. *See People v. Allen*, 198 A.D.3d 531 (1st Dep't 2021). This judgment is supported by overwhelming evidence showing that defendants misappropriated assets from a private equity fund and made material misrepresentations to its investors. *See* Leave Opp. at 2-6.

This Court lacks jurisdiction over defendants' appeal for two independent reasons. *First*, the First Department's order does not directly raise a substantial

constitutional question. *See* C.P.L.R. 5601(b)(1). In invoking a constitutional basis for their appeal, defendants primarily rely on their argument that federal securities laws preempt the application of the Martin Act. *See* Preliminary Appeal Statement at 5. As OAG demonstrated in its opposition to defendants’ motion for leave to appeal (see Leave Opp. at 7-10), this Court lacks jurisdiction over defendants’ appeal as of right based on their preemption arguments because the preemption question is neither “substantial” nor “directly involved” in this appeal.

The preemption question is not “directly involved” because the First Department’s holding on OAG’s Martin Act claims was not outcome determinative. The court expressly noted that “the complaint is not limited to the Martin Act claim; it also includes claims for breach of fiduciary duty.” *Allen*, 198 A.D.3d at 533. OAG’s independent claim for breach of fiduciary duty—a claim that defendants have not argued is preempted—shows that no constitutional question is “directly involved,” since the judgment below can be “independently supported” on a “ground of a nonconstitutional nature.” *See* Arthur Karger, *The Powers of the New York Court of Appeals* § 7:8 (Sept. 2021 update) (Westlaw).

The preemption question is not “substantial” because the First Department correctly applied settled law to reject that argument. *See* Leave Opp. at 7-10. The federal securities laws contain savings clauses that expressly preserve state laws like the Martin Act. *See* 15 U.S.C. §§ 77r(c)(1)(A)(i), 78bb(f)(4). And the Appellate Division and federal appellate courts have consistently rejected arguments that federal securities laws preempt enforcement actions under state laws like the Martin Act. *See, e.g., Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108, 118 (2d Cir. 2001); *Allen*, 198 A.D.3d at 531; *People v. Greenberg*, 95 A.D.3d 474, 479-82 (1st Dep’t 2012), *aff’d*, 21 N.Y.3d 439 (2013). This “settled law” rejecting preemption claims like the ones defendants reiterate establishes that there is a “want of substantiality” here. Karger, *supra*, § 7:5.

The remaining issues identified by defendants are unpreserved and inadequate to provide a basis for jurisdiction under C.P.L.R. 5601(b)(1) in any event. Defendants now assert that the First Department’s application of C.P.L.R. 213(9)’s limitations period to OAG’s Martin Act claim violates their due process rights. *See* Preliminary Appeal Statement at 5. But defendants framed their statute of limitations argument to the First Department as an argument concerning “bedrock principles of statutory interpretation.” Br. for Defs.-Appellants/Relief Defs.-Appellants at 30; *see id.* at 29-34. Defendants’ cursory references to “due process” (*id.* at 1, 30) are inadequate to show that they “raise[d] the specific arguments” they now assert and asked the courts below “to conduct that analysis,” *see Matter of New York City Asbestos Litig.*, 27 N.Y.3d 1172, 1176 (2019). In any event, as OAG has explained (see Leave Opp. at 11-14), the First Department’s ruling on the statute of limitations correctly applied settled law governing statutory construction and

was not outcome dispositive in any event. Accordingly, even if defendants' due process argument were preserved—and it is not—it fails to directly raise a substantial constitutional question.

Defendants also contend for the first time in this appeal that their choice-of-law argument has a constitutional dimension grounded in the Contracts Clause. See Preliminary Appeal Statement at 5. This Court, however, lacks the power to review that unpreserved argument. See *Matter of New York City Asbestos Litig.*, 27 N.Y.3d at 1176. In any event, as OAG has explained (see Leave Opp. at 14-15), the First Department correctly applied New York law to OAG's breach of fiduciary duty claim based on settled law. Accordingly, defendants have failed to directly raise a substantial constitutional question, and the Court should dismiss their appeal for lack of jurisdiction on that ground alone. See C.P.L.R. 5601(b)(1).

*Second*, this Court lacks jurisdiction over defendants' appeal for the additional reason that the First Department's order does not finally determine the underlying action. See N.Y. Const., art. VI, § 3(b)(1)-(2), (6). As this Court observed in its jurisdictional inquiry, Supreme Court's posttrial decision appointed a provisional receiver "subject to the preparation of a proposed order narrowly prescribing the powers and responsibilities of the receiver" (R. 57). The court's order directing entry of judgment expressly confirmed that the judgment "does nothing more than confirm the appointment" of the receiver, leaving open "the precise terms of the appointment order." (R. 58.6-58.7.)

Supreme Court has not yet entered an order granting the receiver powers necessary to liquidate and distribute the fund's assets to its defrauded investors. In May 2021, the First Department entered an order staying "the liquidation of the defendant entities" pending appeal (Order at 2 (May 20, 2021), 1AD NYSCEF No. 35), and the court later clarified that its stay included "the liquidation of the funds and/or the assets held by defendant entities" (Order at 2 (Aug. 5, 2021), 1AD NYSCEF Doc. No. 42). Based on these orders, defendants objected to Supreme Court entering an order granting powers to the receiver, including the ability to carry out preparatory tasks to identify, marshal, and preserve the fund's assets for the benefit of its defrauded investors. Accordingly, the receiver's work—which is subject to the ongoing supervision of Supreme Court—remains outstanding, and the receiver will commence the duties described in the judgment only after a favorable resolution of this appeal and the attendant lifting of the First Department's stay orders pursuant to C.P.L.R. 5519(e).

As a general rule, this Court has held that it lacks jurisdiction over interlocutory judgments that declare the rights and liabilities of the parties and the plaintiff's entitlement to relief, while an equitable proceeding (such as an accounting) remains pending to determine the exact relief due. See *Karger, supra*, § 4:7;

*see also, e.g., Cooper v. Miller*, 292 N.Y. 644 (1944). The judgment here shares those characteristics. Although it finally determines the amount of disgorgement due and the scope of the permanent injunctive relief against defendants, the precise relief afforded to defrauded investors from the dissolution of the fund is not ascertainable until the receiver marshals the fund's assets and determines the respective amounts due to individual investors. (*See* S.R. 9-11.)

To be sure, this Court has recognized an exception to the finality requirement where the effect of the interlocutory judgment causes “irreparable injury or a change of position” to the adverse party. *Karger, supra*, § 5:1. Applying this exception, this Court has found the finality requirement satisfied where the interlocutory judgment had the immediate effect of transferring property. *See id.*; *see also, e.g., Graham v. Fisher*, 273 N.Y. 652 (1937). But the judgment on appeal here will not immediately effectuate the liquidation of the underlying investment fund. A receiver has only those powers conferred by court order, *see Daro Indus. v. RAS Enters.*, 44 N.Y.2d 969, 970-71 (1978), and Supreme Court has not yet entered an order of appointment delineating the scope of the receiver's authority. And even once such an order is entered, the receiver will first need to identify the fund's assets, acquire custody and control of the fund's property and records, and preserve the fund's assets. Then the receiver will need to develop a written plan for a fair, reasonable, and cost-efficient recovery, liquidation, and distribution of the fund's assets, subject to court approval and an opportunity for all parties to be heard. In sum, the judgment is not final, and this Court lacks jurisdiction because the precise relief due remains to be determined in further Supreme Court proceedings and the interlocutory judgment on appeal will not immediately cause irreparable injury to defendants. *See* N.Y. Const., art. VI, § 3(b)(1)-(2), (6).

Respectfully submitted,

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