10-2257-BK(L)
10-2411-BK(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: TELIGENT, INCORPORATED,

Debtor

SAVAGE & ASSOCIATES, P.C.,

Plaintiff-Appellant-Cross-Appellee,

v.

K&L GATES LLP,

Appellee-Cross-Appellant,

and

ALEX MANDL,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York (New York City)

BRIEF FOR PLAINTIFF-APPELLANT-CROSS-APPELLEE

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APPELLANT'S BRIEF IN APPEAL[1]

Savage & Associates, P.C. (the "**Appellant**" or "**Representative**"), as and for the appointed Unsecured Claims Estate Representative of Teligent, Inc., respectfully files this brief (the "**Appellant's Brief**") in the above-captioned appeal (the "**Appeal**"):

I. STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 158(d)(1), 1291 and 1334 and Rule 8001(a) of the Federal Rules of Bankruptcy Procedure ("**FRBP**"). Venue of this Appeal in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

II. STATEMENT OF ISSUES PRESENTED

1. Whether the Bankruptcy Court erred in denying the Representative's Cross-Motion for injunctive relief by: (a) ruling that K&L Gates LLP ("**KL**") lacked Article III standing to object to the entry of an Order approving the Settlement Agreement in the Adversary Proceeding; (b) ruling that KL lacked prudential standing to object to the entry of an Order approving the Settlement Agreement in the Adversary Proceeding; (c) allowing KL standing for purposes of modifying the

[1] References to pages of documents contained in the Joint Appendix filed in this Appeal (the "**Appeal**") shall be referred to as "**[A____]**" References to pages contained in the Special Appendix filed in this Appeal shall be referred to as "**[SPA____].**"

Mediation Order, but ruling that KL had no standing to object to entry of an Order approving the Settlement Agreement. **[SPA 18-20]**

2. Whether the Bankruptcy Court erred in denying the Representative's Cross-Motion for injunctive relief by: (a) ruling that KL was not a "party in interest" in the Adversary Proceeding under Section 1109(b) and did not have the right to intervene pursuant to FRBP 2018 and/or FRBP 7024; **[SPA 18-20]** (b) ruling that KL was not a party in interest and did not have the right to intervene in the Adversary Proceeding, rejecting the argument that matters that could have been litigated by KL in the Representative's Rule 9019 Motion compel the application of the "relitigation exception" under principles of res judicata; **[SPA 20-22]** (c) ruling that KL could not have objected to the Order approving the Settlement Agreement because in order to do so it would have had to assert the legal rights or interests of third parties, thus disregarding the direct interest in and impact of the Settlement Agreement on KL. **[SPA 20-22]**

3. Whether the Bankruptcy Court erred in denying the Representative's Cross-Motion for injunctive relief by ruling that KL (whether or not it had standing to object to the entry of an Order approving the Settlement Agreement in the Adversary Proceeding) is not estopped from collaterally attacking the validity of Paragraph 3.3 of the Settlement Agreement in the D.C. Superior Court. **[SPA 20-25]**

4. Whether the Bankruptcy Court erred in denying the Representative's Cross-Motion for injunctive relief by:

a. implicitly finding that there was no case or controversy to resolve because there is no existing applicable state law that conflicts with applicable Bankruptcy Law, notwithstanding KL's expressly stated intent to attempt to make new District of Columbia law in the D.C. Superior Court designed to void the Settlement Agreement in whole or in part and to attempt to obtain a determination in the D.C. Superior Court nullifying provisions of the Settlement Agreement and the Order approving the Settlement Agreement; **[SPA 22]**

b. implicitly authorizing KL to seek a D.C. Superior Court ruling to establish new District of Columbia law by ruling that a D.C. Superior Court decision, if issued, retroactively invalidating paragraph 3.3 of the Settlement Agreement would not violate the Supremacy Clause of the Constitution, despite the existence of the Settlement Agreement approved by an Order of the Bankruptcy Court; **[SPA 21-23]**

c. ruling that there was no violation of the Supremacy Clause because there is no extant District of Columbia law conflicting with the terms of the Settlement Agreement, notwithstanding KL's expressly stated intent to seek a D.C. Superior Court order establishing conflicting District of Columbia law

and using said ruling to invalidate the provisions of the Settlement Agreement and the Order approving the Settlement Agreement; **[SPA 21-24]**

d. effectively ruling, by (i) failing to enjoin KL, that KL can seek to collaterally attack the Settlement Agreement and Order approving the Settlement Agreement by alleging unlawful collusion by the parties to the Settlement Agreement in the Bankruptcy Court; (ii) failing to consider the overall structure, objectives, province and purpose of the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code when determining the applicability of the Supremacy Clause; (iii) ruling as "speculative" the Representative's argument that a decision in the D.C. Superior Court that the Settlement Agreement or provision thereof is unlawful would impair the Order approving the Settlement Agreement and the Representative's ability to enforce the terms thereof; **[SPA 21-24]**

e. effectively ruling that conflicting, later adopted state law may retroactively invalidate the express provisions of a Bankruptcy Court order, despite the fact that the Representative is not a party to the D.C. Superior Court litigation; and ruling that even if the D.C. Superior Court were to issue a decision in direct conflict with the terms of the Bankruptcy Court-approved Settlement Agreement, such decision would prevail because "[p]roperty rights in bankruptcy are generally determined under state law"; **[SPA 22]**

f. ruling that KL's attempt to invalidate paragraph 3.3 of the Settlement Agreement in the D.C. Superior Court "does not affect the validity of the [Bankruptcy Court's] Settlement Order, or anything that the Court decided"; implicitly determining that a ruling on property rights by the D.C. Superior Court can affect the validity and binding nature of the Settlement Agreement and the Order approving the Settlement Agreement, and can bind the Representative, which is not a party to the D.C. Superior Court litigation, and create a scenario whereby Alex Mandl (a party in both the Adversary Proceeding and the D.C. Superior Court) could be compelled to comply with conflicting federal and state court orders. **[SPA 23-24]**

5. Whether the Bankruptcy Court erred in denying the Representative's Cross-Motion for injunctive relief by ruling that KL may not be enjoined, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and the Anti-Injunction Act, 28 U.S.C. § 2283, from seeking to invalidate paragraph 3.3 of the Settlement Agreement in the D.C. Superior Court because:

a. 11 U.S.C. § 105(a) does not serve as express authorization for such an injunction; **[SPA 22-23]**

b. the "relitigation exception" of the Anti-Injunction Act and the Supremacy Clause would not apply to KL's attempts to obtain a D.C.

Superior Court decision invalidating paragraph 3.3 of the Settlement Agreement;**[SPA 23-24]**

c. an injunction is not necessary to aid the Court's jurisdiction or to effectuate its orders; **[SPA 23-25]**

d. there was no legal significance to the fact that the Order **[SPA 23-24]** approving the Settlement Agreement expressly provided that the "Court having determined that the legal and factual bases set forth in the [9019] Motion established just cause for the relief granted" and the Representative "shall have all the rights and privileges set forth in the [Settlement] Agreement" and "authorized [the Representative] to take all such action necessary under the [Settlement] Agreement to effectuate the [Settlement] Agreement." **[A103-104]**

6. Whether the District Court plainly erred as a matter of fact, and erred as a matter of law, when determining that the Appellant was seeking to enjoin a state court, as opposed to enjoining a party appearing before a state court, and erred in determining that said party (KL) could not be enjoined from seeking to collaterally attack the Settlement Agreement and the Order approving the Settlement Agreement. **[SPA 44]**

7. Whether the District Court plainly erred as a matter of fact and law by holding that the Appellant failed to "point to any other provision of the Bankruptcy

Code or identify contrary authority for its position that the court should rely on the 'basic purpose' of Section 105(a)." **[SPA 44-45]**

8. Whether the District Court plainly erred as a matter of fact and law in determining that "the Bankruptcy Court did not determine the validity of the Proceeds Assignment or the Agreed Valuation. Instead the Bankruptcy Court merely determined the propriety of the settlement," and, thus concluding that the relitigation exception of the Anti-Injunction Act does not apply. **[SPA 45]**.

9. Whether the District Court plainly erred as a matter of fact and law in determining that litigation of issues related to the Settlement Agreement in the D.C. Superior Court would not create potential conflict with the Bankruptcy Court Order approving the Settlement Agreement in the face of KL's express intent to now seek relief before the D.C. Superior Court based upon *Edens Technologies, LLC v. Kile Goekjiam Reed & McManus, PLLC*, 675 F. Supp. 2d 75 (D.D.C. 2009), without regard to the mandate to apply New York law to the Representative's right under the Judgment and the Order approving the Settlement Agreement and pursuant to FRCP 69. **[SPA 48]**

10. Whether the District Court plainly erred as a matter of fact and law in determining that the Bankruptcy Court had not erred in refusing to issue an injunction against KL to prevent it from raising certain issues in the D.C. Superior Court based on doctrines of claim and issue preclusion. **[SPA 46-47]**

11. Whether the District Court erred in concluding that the Supremacy Clause did not justify the imposition of an injunction against KL. **[SPA 19-20]**

III. STANDARD OF APPELLATE REVIEW

In appeals from district court orders relating to bankruptcy court decisions, this Court "review[s] the decision of the bankruptcy court independently, examining its conclusions of law *de novo* and its factual findings for clear error." *Contrarian Funds LLC v. Aretex LLC (In re Westpoint Stevens, Inc.)*, 600 F.3d 231, 247 (2d Cir. 2010) (internal citations and quotations omitted). With limited exceptions, the Court reviews questions of textual construction *de novo*. *Id*.

While a court's interpretation of its orders is typically given deference, *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995), such deference is only appropriate where the court drafts the order. *Contrarian*, 600 F.3d at 252 (explaining the reason for deferring to a court interpreting its own order as "premised on the truism that the draftsman of a document is uniquely situated to understand the intended meaning of that document." (citation omitted)) As the Settlement Agreement and Settlement Agreement Order (defined below) were drafted by the Appellant, not by the Bankruptcy Court, it is respectfully submitted that this Court should accord no deference to the Bankruptcy Court's interpretation of the Settlement Agreement or the Settlement Agreement Order, and that these documents must be reviewed *de novo*. *Id*.

IV. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

a. Nature of the Case

This Appeal is occasioned by a decision rendered in an adversary proceeding (the "**Adversary Proceeding**") between the Representative and Alex Mandl ("**Mandl**") before the Hon. Stuart M. Bernstein, Chief U.S. Bankruptcy Judge for the Southern District of New York, denying, *inter alia*, the Representative's Cross-Motion seeking an order enjoining the law firm KL Gates (the Appellee and Cross-Appellant herein, and hereinafter referred to as "**KL**") from collaterally attacking, in the D.C. Superior Court, the Bankruptcy Court Order (the "**Settlement Agreement Order**" **[A103]**) approving a settlement agreement of the Adversary Proceeding (the "**Settlement Agreement**" **[A56]**) drafted and executed between the Representative and Alex Mandl (**"Mandl**"), and having the D.C. Superior Court void certain critical terms of the Settlement Agreement (the "**Cross-Motion" [A298]**).

Per the terms of the Settlement Agreement, (a) Mandl was compelled to, and indeed, commenced, in the D.C. Superior Court, a professional liability action against KL (the "**D.C. Action**"), his former counsel in the Adversary Proceeding **[SPA 6, 8]**, and (b) Mandl is obligated to remit to the Representative 50% of all proceeds in the D.C. Action, net of attorneys' fees and expenses (the **"D.C. Proceeds**"). **[SPA 6]**

Mandl commenced the D.C. Action prior to the execution of the Settlement Agreement, and one day prior to the filing of a motion (the "**9019 Motion**"**[A38]**) under FRBP 9019, to obtain approval of the Settlement Agreement from the Bankruptcy Court. **[SPA 8]** KL concedes it was served with the 9019 Motion and with the complaint in the D.C. Action *prior* to the hearing on the 9019 Motion and entry of the Settlement Agreement Order approving the Settlement Agreement **[SPA 7]**, yet KL chose not to object to the 9019 Motion. **[SPA 7]**

Upon filing its answer (the "**KL D.C. Action Answer**" **[A476]**) in the D.C. Action, KL, for the first time, disclosed its intent to seek to void the D.C. Proceeds provision of the Settlement Agreement, by asserting the following affirmative defense in the D.C. Action: "The claims that Mandl asserts are barred as an unlawful assignment, which occurred in his settlement with the Representative ..." **[A488]**

KL was fully aware, upon being served with the 9019 Motion, that the Settlement Agreement contained express provisions requiring Mandl to sue KL for legal malpractice, and to remit the D.C. Proceeds to the Representative. **[SPA 6]** If KL was of the view that this constituted an unlawful assignment, or that the Settlement Agreement was otherwise unlawful or improper in any way, it was incumbent on KL to object to the 9019 Motion. Instead, KL chose to remain silent, and allowed the Bankruptcy Court to grant the 9019 Motion and approve the

Settlement Agreement without objection, evidently preferring to bide its time and then launch a collateral attack on the Settlement Agreement in a different court, with the ultimate objective of not only voiding the Representative's express rights under the Settlement Agreement, but to further utilize this act as a platform upon which to seek dismissal of the entire D.C. Action, thus evading any liability to Mandl.

Upon learning of KL's intent to seek to void the D.C. Proceeds provision in the D.C. Action, after having chosen not to object to the 9019 Motion, the Representative filed the Cross-Motion **[A298]**) in the Bankruptcy Court alleging that KL, having received notice of the 9019 Motion **[SPA 6]**, and having failed to object, should be enjoined from collaterally attacking the Settlement Agreement, or any provision thereof, in the D.C. Action.

The Bankruptcy Court denied the Cross-Motion for the reasons set forth in the Bankruptcy Decision. **[SPA 1-26].**

Following an appeal to the District Court, on May 13, 2010, the District Court entered a Memorandum Decision and Order (the "**District Court Decision**") affirming the Bankruptcy Decision. [**SPA 29-50].** Savage and KL each filed a notice of appeal from the District Court Decision. **[A 645, 647]** Mandl did not file a notice of appeal.

b. Course of the Proceedings

On May 21, 2001, Teligent, Inc. and its domestic subsidiaries, filed for protection under Chapter 11 of Title 11 of the U.S. Code. **[SPA 4]**

In September 2002, the Representative was appointed the Unsecured Claims Estate Representative of Teligent, Inc. ("**Teligent**") pursuant to Teligent's confirmed Chapter 11 Plan of Reorganization ("**Plan**") [U.S.B.C. Docket No. 01-12974, ECF Doc. 1211]. Under the Plan, the Representative is vested with, among other things, the right to commence, on behalf of Teligent, adversary proceedings arising under Chapter 5 of Title 11 of the U.S. Code. **[SPA 4]**

In April 2003, the Representative commenced numerous adversary proceedings (the "**Adversary Proceedings**") against various defendants, including Mandl (together with the Representative, the "**Parties**"), the former President and CEO of Teligent, seeking recovery of certain preferential, improper post-petition and fraudulent transfers. **[SPA 4]**

The gravamen of the Adversary Proceeding against Mandl was that Mandl had voluntarily and without cause, resigned from his positions as President and CEO of Teligent three days prior to Teligent's Chapter 11 filing, thus contractually mandating the repayment of a $12 million loan (plus accrued interest) that Mandl had received from Teligent. **[SPA 4]** Mandl contended throughout discovery that he had been terminated for other than cause, thus compelling the forgiveness of the

Loan under his Employment Agreement with Teligent. *Savage & Associates, P.C. v. Mandl (In re Teligent, Inc.),* 380 B.R. 324 (Bankr. S.D.N.Y. 2008)

In connection with and governing all Adversary Proceedings, on February 3, 2004, the Bankruptcy Court entered a Mediation Order **[A168]** which, in addition to compelling, *inter alia*, mandatory mediation in the Adversary Proceedings, required confidentiality with respect to the mediation proceedings consistent with applicable federal statutes and local court rules. **[SPA 4]**

Pursuant to the Mediation Order, the Parties participated in two rounds of mediation. The first round of mediation took place in the summer of 2004 ("**Mediation I**") and the Mediation I did not result in a settlement. At that time, Mandl was represented by KL. **[SPA 5]**

On January 3, 2008, the Bankruptcy Court entered a decision awarding the Representative judgment against Mandl in the sum of $12,040,000. *Id*. at 324. A judgment (the "**Judgment**") was entered by the Court in favor of the Representative and against Mandl. **[A243]**.

After entry of the Judgment, Mandl, still represented by KL, filed post-Judgment motions seeking, among other things, a new trial based upon the alleged discovery of "new evidence" in the form of nine witnesses and draft board minutes. **[SPA 6**, U.S.B.Ct., Docket No. 03-2523. EDF Doc. # 201]

At the time of the filing of the post-Judgment motions by Mandl, Mandl had retained Greenberg Traurig ("**GT**") as his co-counsel. **[SPA 5]**

On April 10, 2008, KL moved to be relieved as Mandl's counsel. [U.S.B.C., Docket No. 03-2523, ECF Doc. # 217] The motion was granted by entry of an Order of the Bankruptcy Court on April 28, 2008. [U.S.B.C., Docket No. 03-2523, ECF Doc. # 218].

After KL withdrew as Mandl's counsel, GT continued as Mandl's counsel. GT, on Mandl's behalf, and the Representative resumed the court-ordered mediation ("**Mediation II**, together with Mediation I, the **"Meditations**"). **[SPA 6]** Prior to the commencement of Mediation II, in connection with disclosure by Mandl of his assets available to satisfy the Judgment, Mandl disclosed a legal malpractice claim against KL as one of his most significant assets. **[SPA 6]** As such, Mandl's new counsel, GT, invited KL to participate in Mediation II to try to achieve a global resolution of claims. **[SPA 6]** KL declined to participate in Mediation II, but was, thus, aware of the malpractice claim Mandl intended to assert against it. **[SPA 6]**

Mediation II commenced on March 25, 2008 and continued through the execution of the Settlement Agreement drafted by GT (for Mandl) and the Appellant **[A56],** and the filing of the 9019 Motion on June 6, 2008, seeking Bankruptcy Court approval of the Settlement Agreement. **[A38, A91]**)

On May 20, 2008 (prior to the filing of the 9019 Motion), Mandl filed a Complaint in the D.C. Superior Court instituting the D.C. Action against KL. **[SPA 8]**

Upon filing the 9019 Motion, the Representative effected electronic service of the 9019 Motion on, *inter alia*, Robert Michaelson, Esq., a partner at KL. **[A344]**. KL does not deny that it received timely notice of the 9019 Motion.

No objections to the 9019 Motion were filed, and no objectants appeared at the hearing on the 9019 Motion. **[SPA 7]** The 9019 Motion and Settlement Agreement were approved by the Bankruptcy Court via the entry of the Settlement Agreement Order on July 30, 2008, *which Order was drafted by the Appellant*, with one small modification noted by the Court, and thereafter entered**. [A103]**

Under the Settlement Agreement, Mandl is to pay $6.005 million in cash to the Representative. **[SPA 7]** In order to pay this sum, Mandl liquidated stock and pension holdings, and Susan Mandl and ASM (a Mandl controlled entity) sold millions of dollars in options in Gemalto (Mandl's employer after Teligent), which the Representative had contended in a Virginia state court action (the "**Virginia Action**") had been fraudulently transferred by Mandl to Susan Mandl and/or ASM. **[A65-67]**.

In addition, under the Settlement Agreement, Mandl is obligated to remit to the Representative 50% of the D.C. Proceeds obtained by Mandl. **[A70]**.

The essential provisions of the Settlement Agreement are set forth here:

a. Section 3.3 provides that "Mandl shall remit to the Representative an amount equal to 50% of net funds recovered by Mandl in the K&L Gates Action (the 'Third Payment'), which funds shall be remitted to the Representative within ten (10) business days after Mandl's receipt of such funds, as more fully set forth below in Section 5.6. The 'net funds recovered' shall be the amount remaining after payment of attorneys' fees (in an amount not to exceed (i) 33% of the gross recovery, whether by judgment, settlement or otherwise or (ii) 38% of the gross recovery in the event a notice of appeal is filed or post-judgment relief or action is required for recovery of any final judgment against K&L Gates) and all costs incurred with respect to the K&L Gates Action, including reimbursement to Mandl of his deposit against costs with Hall Lamb & Hall P.A." **[A70]**

b. Section 5, entitled "The K&L Gates Action," and sub-section 5.3 provide, in relevant part, that "Mandl's agreement to make the Third Payment to the Representative upon the final resolution of the K&L Gates Action does not constitute in any manner an assignment of Mandl's claim against K&L Gates to the Representative or any other party." **[A72-73]**

c. Section 20.1 provides that "[t]his Agreement shall be deemed to have been jointly drafted by the Parties and in construing and interpreting this Agreement, no provision shall be construed or interpreted for or against any of the parties because such provision, or any other provision, or the Agreement as a whole, was purportedly prepared or requested by such party." **[A80]**

d. Section 20.2 provides that "[i]t is the intent of this Agreement to resolve all claims and disputes among the parties and any construction or interpretation of the Agreement should be done in such a fashion as to effectuate its intent." **[A80]**

e. Section 23 provides that "[t]his Agreement shall be governed, as applicable, by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and by the substantive laws of the State of New York, without regard to conflict of law principles." **[A80]**

f. Section 24 provides that the "[t]he Bankruptcy Court retains jurisdiction with respect to any and all issues arising with respect to this Agreement and enforcement thereof." **[A81]**

On July 29, 2008, the Bankruptcy Court granted the 9019 Motion. The Court's Order stated that "*this Court having determined that the legal and factual bases set forth in the [9019] Motion established just cause for the relief granted*

herein" and the Representative "*shall have all the rights and privileges set forth in the Agreement*" and may take all "*action necessary under the Agreement to effectuate the Agreement*." **[A103-104]** (Emphasis added).

On August 8, 2008, *a mere nine days after entry of the Settlement Agreement Order*, KL filed its Answer in the D.C. Action and, among other allegations and defenses, set forth in its "Ninth Defense" that "[t]he claims that Mandl assert are barred as an unlawful assignment, which occurred in his settlement with the Representative in the adversary proceedings (sic)" **[A476, 488]**.

Under the Settlement Agreement, the Representative continues to hold the Judgment and would have the right to enforce and execute a judgment based upon the Settlement Agreement Order in the event of a default under the Settlement Agreement. **[A62-66]**

Pursuant to the Answer filed by KL in the D.C. Action, and statements made by KL in its brief filed in the District Court on January 8, 2010 [U.S.D.C. Docket No. 09-9674, ECF Doc.# 14 and 29], KL contends that Mandl's obligation to pay to the Representative the D.C. Proceeds constitutes an improper assignment of the malpractice claim against KL and, thus, KL now seeks to void not only the D.C. Proceeds provision, but the entire Settlement Agreement alleging, among other things, collusion by Mandl and the Representative in reaching the terms of the

Settlement Agreement. [KL's Brief filed in the U.S.D.C., Docket No. 09-9674, ECF Doc# 14, pgs 15-20]

On March 5, 2009, KL filed a motion (the "**Mediation Motion**" **[A109]**) in the Bankruptcy Court seeking to intervene in the Adversary Proceeding in order to move the Bankruptcy Court to suspend the confidentiality provisions of the Mediation Order. KL asked the Bankruptcy Court to lift confidentiality in order to allow KL to take discovery (including a deposition of the Mediator) to find out what was discussed and what occurred during Mediation II, alleging it would suffer irreparable harm arising from, among other things, a lack of due process in the D.C. Action. **[A109]**

In addition to filing an objection to the Mediation Motion (the "**Representative's Mediation Motion Objection** " **[A298]**), the Representative filed the Cross-Motion **[A298]** seeking an order from the Bankruptcy Court enjoining KL from attempting to void any portion of the Settlement Agreement in the D.C. Action.

During the pendency of the Cross-Motion in the Bankruptcy Court, KL admitted that neither New York nor District of Columbia law prohibited the assignment of a malpractice action **[A367],** and avoided asserting in its papers which state's law it believed is applicable to the D.C. Proceeds provision of the Settlement Agreement. **[A367-370]** However, after the entry of the Bankruptcy

Decision, the U.S. District Court for the District of Columbia entered a decision that was cited in KL's appeal brief filed with the District Court (*Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75 (D.D.C. 2009)) which KL touted as the governing law to interpret the Representative's rights under the Settlement Agreement with respect to its interest in the D.C. Proceeds. *See KL's Brief* at 19, 24, U.S.D.C. Docket No. 09-9674, Doc. No. 14.

Furthermore, in the Mediation Motion **[A125-126]** and at the hearing thereon **[A523]**, KL disclosed that it also intends to attempt to void the so-called "gross-up" provision (which is not a provision of the Settlement Agreement, but is a value attributed to the settlement set forth not as an affirmative duty but as a Recital clause on page 8 of the Settlement Agreement). **[A63]** KL alleges collusion in the Bankruptcy Court, among other charges, between Mandl and the Representative. **[A498]**

c. The Bankruptcy Court Decision

On May 12, 2009, a hearing (the "**Hearing**") on the Mediation Motion and Cross-Motion was held in the Bankruptcy Court. **[A498]]**

On September 24, 2009, the Bankruptcy Court entered the Bankruptcy Decision denying the Cross-Motion. **[SPA 1]** The Bankruptcy Decision is

reported at *Savage & Associates, P.C. v. Mandl (In re Teligent)*, 417 B.R. 197 (Bankr. S.D.N.Y. 2009).

On May 13, 2010, the U.S. District Court entered a Memorandum Decisions and Order affirming the Bankruptcy Decision. **[SPA 29,** reported at *2010 U.S. Dist LEXIS 49010* (S.D.N.Y. May 13, 2010)**]**

ARGUMENT

POINT ONE

THE BANKRUPTCY COURT ERRED IN RULING THAT KL DID NOT HAVE STANDING TO APPEAR AND OBJECT TO THE 9019 MOTION

i. KL Effectively admits It Had standing To Appear On The 9019 Motion

KL argued in the appeal to the District Court that KL has standing to seek to modify the Mediation Order because it

> has a keen financial interest in defending itself against Mandl's direct claims against the firm. K&L has identified an ***immediate, concrete injury resulting from the bankruptcy court's decision***: it has been deprived of access to documents for which it has a "compelling need" ***to defend against a multi-million dollar malpractice claim***, and Savage's objections have blocked both production of documents and questioning of key witnesses.

KL's Cross-Appeal Brief filed in U.S.D.C., Docket No. 09-9674, ECF Doc.# 29 at 4 (Emphasis added). At the very same time, KL argued in its Opposition to the

Appellant's Cross-Appeal in the District Court that it had no standing to object to the 9019 Motion:

> [T]he bankruptcy court correctly held that K&L lacked Article III standing and was not a "party in interest" within 11 U.S.C. § 1109(b) entitled to object to the approval of the Settlement Agreement under Fed. R. Bankr. P. 9019. As courts have uniformly held in similar circumstances, K&L had no "concrete and particularized" "injury in fact" flowing from or "direct financial stake" in the Settlement Agreement simply because the assignment provision might, potentially years from now, affect Mandl's recovery (if any) against K&L.

KL Cross-Appeal Brief to U.S.D.C., Docket No. 09-9674, ECF Doc.# 29 at 3-4. KL's admission – indeed, *insistence* – that it has standing to appear and ask the Bankruptcy Court to modify the Mediation Order so that it can defend itself and avoid further harm in the D.C. Action, cannot be reconciled with its position that it had no standing to object to the 9019 Motion seeking approval of the very Settlement Agreement that calls for the D.C. Action to be brought and maintained against KL, and for the D.C. Proceeds to be remitted to the Representative. Given KL's admission of "immediate, concrete injury" as its basis for standing to file its Motion in the Bankruptcy Court, KL likewise had standing under 11 U.S.C. § 1109, FRBP 7024 and/or FRBP 2018 to appear on the 9019 Motion.

ii. The Bankruptcy Court applied the incorrect standing standard

Case law has established that the standard for determining *appellate standing* in the bankruptcy context differs from the constitutional standard for

standing applied to other federal proceedings and under Section 1109 of the Bankruptcy Code. *See In re PWS Holding Corp.*, 228 F.3d 224, 248-49 (3d Cir. 2000); *Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 210 n. 18 (5th Cir. 1994). Notwithstanding the foregoing and KL's admission of injury, the Bankruptcy Court concluded that KL did not have standing to appear on the 9019 Motion.[2] **[SPA17-19]**

Appellate standing in bankruptcy appeals is generally limited to persons that are "aggrieved" by the Bankruptcy Court's decision. *International Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 747 (2d Cir. 1991).[3] The "person[] aggrieved" standard generally limits the ability to appeal to those whose rights are "directly and adversely affected pecuniarily" by the Bankruptcy Court order. *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989)(internal quotation omitted). Bankruptcy law requires such a restrictive role for *appellate standing* because otherwise "bankruptcy litigation will become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order." *Kane v. Johns Manville Corp.*, 843 F.2d 636, 642 (2d

[2] And the District Court failed to even analyze this issue.

[3] In *International Trade Administration v. Rensselaer*, the Second Circuit specifically delineated the "person aggrieved" standard *as contrasted with* the broader standing standard under 11 U.S.C. § 1109 and Article III of the Constitution. *Id.* Regardless of the fact that the "person aggrieved" standard is only *limited to bankruptcy appeals*, the Bankruptcy Court erroneously applied this standard in an *original proceeding* before the court, and cited two bankruptcy appeal cases in support, *Austin Assoc. v. Howison (In re Murphy)*, 288 B.R. 1, 4-5 (Bankr. D. Me. 2002) and *Integrated Solutions, Inc. v. Serv. Support Specialities, Inc.*, 193 B.R. 722, 726 (Bankr. D.N.J. 1996), *aff'd*, 124 F.3d 487 (3d Cir. 1997). **[SPA at 19-20]**.

Cir. 1988) (citations omitted). "This standing limitation is more exacting than the constitutional case or controversy requirement imposed by Article III, for under the constitutional 'injury in fact' test, the injury need not be financial and need only be 'fairly traceable' to the alleged illegal action." *id*. at 642 n.2 (internal citations omitted).

The Bankruptcy Court erroneously applied the "pecuniary interest" standard (i.e., *the appellate standing criteria*) to determine KL's standing to appear and be heard on the *9019 Motion*, *which was a direct motion before the Bankruptcy Court in which standing must be determined under the broader standard of 11 U.S.C. § 1109*. **[SPA 19-20]**.

The Bankruptcy Court further erroneously ruled that KL did not have standing to appear on the 9019 Motion, reasoning incorrectly that had KL sought to appear it would merely have been raising "the rights of [an unnamed and unspecified] third party." **[SPA 18-19]** Under the correct legal standard for standing in an original proceeding in the Bankruptcy Court (i.e., 11 U.S.C. §1109), KL could have appeared directly in opposition to the 9019 Motion without regard to any third party rights.

iii. KL Was A Party-In-Interest Under Section 1109

The Mediation Order (the confidentiality provisions of which KL seeks to modify) was entered on February 3, 2004, long *prior* to the filing of the 9019

Motion, the execution of the Settlement Agreement, and the filing of the D.C. Action. **[A168]** Thus, the risk and injury that KL urges was wrought by the confidentiality provisions of the Mediation Order *existed at the time of the filing* of the 9019 Motion. Thus, the preexisting Mediation Order put KL on notice of its confidentiality risks (and KL's purported injury) if the 9019 Motion was approved. The 9019 Motion sought approval of the Settlement Agreement that mandated the pursuit of the D.C. Action and the remittal of the D.C. Proceeds to the Representative. But for approval of the 9019 Motion, the Mediation Order would not even be implicated.

KL, a major law firm, knew and understood all of this at the time it was served with the 9019 Motion. Yet, it chose to remain silent and to assert no objection to the 9019 Motion. Only later, when KL made the tactical decision to appear in the Bankruptcy Court and assert its standing to move to modify the Mediation Order, did KL represent that it had been injured by the proceedings in the Bankruptcy Court. Perhaps KL did not anticipate that this admission would compel the conclusion that it had standing all along to object to the 9019 Motion. When confronted with that fact in the Cross-Motion, KL tried to backtrack, arguing that it had standing when it suited its purpose to admit standing, and arguing that it had no standing when it suited its purpose to deny standing. But KL cannot have it both ways. The underlying facts establish that KL had standing at

all relevant times. Standing did not suddenly spring into existence when KL decided it wanted to take discovery regarding the Mediation. KL's purported injury under the Mediation Order is no more concrete or actual than its injury from the Settlement Agreement and the 9019 Motion, without which KL would not have had any reason to seek to modify the Mediation Order.

Because KL admits it had standing to appear before the Bankruptcy Court on the Mediation Motion and had appellate standing in the Appeal to the District Court (by satisfying the more limited, appellate review standing of "aggrieved party" having a "pecuniary interest," and Article III criteria) it *must*, *ipso facto,* also have standing under the broader and delimiting standing criteria under Section 1109 and Article III *which encompasses*, *but is not limited to,* the "aggrieved party" and "pecuniary interest" standard of bankruptcy appellate standing.[4]

There are a number of legal bases KL could have invoked to assert standing before the Bankruptcy Court to object to the 9019 Motion. The Bankruptcy Court would have had a duty to analyze all bases for standing presented to it, to

[4] Because KL intends to seek, in the D.C. Action, an order voiding the D.C. Proceeds provision under D.C. law and voiding the so-called "gross-up" provision of the Settlement Agreement (all of which it could have sought to void by filing an objection to the 9019 Motion), KL implicitly admits that it would meet the Article III standing requirements (of injury in fact, causation and redressability) and prudential standing requirements for appearance before the Bankruptcy Court, since the same Constitutional standing requirements are mandated to attain standing to address these in the D.C. state courts. *United Black Fund, Inc. v. D.C., et al.*, 2004 D.C. Super Lexis 20, at *6 (D.D.C. November 9, 2004) .

determine whether KL could have appeared and been heard in opposition to the 9019 Motion.[5]

> Standing under 11 U.S.C. § 1109 contemplates:
>
> In general, a "party in interest" under section 1109(b) is any person with a direct financial stake in the outcome of the case, including the debtor, any creditor and any equity participant….
>
> Furthermore, the definition of who may be a "party in interest" is not necessarily limited to these persons. *Thus, a person not expressly enumerated in section 1109(b) may also qualify as a "party in interest" if the person possesses a significant legal (as contrasted with financial) stake in the outcome of the case*.

7-1109 Collier on Bankruptcy ¶ 1109.02 (16th ed. Rev. 2009)(emphasis added).

11 U.S.C. § 1109(b) is interpreted broadly to allow parties in interest the opportunity to appear and be heard in proceedings that affect their interests. *Asbestos Settlement Tr. v. Port Auth. of N.Y & N.J. (In re Celotex Corp.)*, 377 B.R. 345 (Bankr. M.D. Fla. 2006). The phrase "any issue in a case" in 11 U.S.C. § 1109(b) grants the right to raise, appear and be heard on any issue regardless of whether it arises in a contested matter or adversary proceeding. *Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.),* 303 F.3d 161 (2d Cir. 2002).

The term "party in interest" is not limited by the small list of examples in 11 U.S.C. § 1109(b), but rather § 1109(b) is construed broadly to permit parties affected by a Chapter 11 proceeding to appear and be heard; the court must

[5] Standing is a "threshold question in every federal case." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). Federal courts are required to examine jurisdictional issues including standing, even *sua sponte*, if necessary. *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999).

determine on a case-by-case basis whether the prospective party in interest has a sufficient stake in the proceeding. *Lazard v. Texaco, Inc. (In re Texaco, Inc.),* 81 B.R. 820, 828 (Bankr. S.D.N.Y. 1988);

The Bankruptcy Court erroneously relied on four cases in defining the parameters of Section 1109 standing before the Bankruptcy Court: *Roslyn Savs. Bank v. Comcoach Corp. (In re Comcoach)*, 698 F.2d 571, 573 (2d Cir. 1983), *In re Quigley Co.*, 391 B.R. 695 (Bankr. S.D.N.Y. 2008), *Austin Assocs. v. Howison (In re Murphy)*, 288 B.R. 1 (Bankr. D.Me. 2002) and *Integrated Solutions Inc. v. Serv. Support Specialities, Inc.*, 193 B.R. 722 (Bankr. D.N.J. 1996), *aff'd,* 124 F.3d 487 (3d Cir. 1997).

The Bankruptcy Court erroneously relied on the meaning of "party in interest" set forth in *Comcoach* under 11 U.S.C. § 362, instead of the meaning of "party in interest" under 11 U.S.C. § 1109, and concluded that KL did not have standing to appear on the 9019 Motion. **[SPA 17-19]** The Bankruptcy Court relied on *Austin* and *Integrated* in erroneously defining the parameters of standing under Section 1109**.**

Comcoach does not provide the definition of "party in interest" under Section 1109. In 2007, this Court explained the limited scope of the *Comcoach* holding, and expressly stated that the *Comcoach* definition does not apply to "party in interest" under Section 1109: "[i]n *Comcoach*, we were interpreting the term

'party in interest' in the context of a request for relief from a stay under 11 U.S.C. § 362(d)(1), and not in the context of the right to be heard under § 1109(b)." *Krys v. Official Comm. of Unsecured Creditors of Refco, Inc. (In re Refco, Inc.)*, 505 F.3d 109, 116 n.8 (2d Cir. 2007).

Despite this very direct disclaimer by this Court, and even though the Bankruptcy Decision cited *Krys*, the Bankruptcy Court nevertheless applied the *Comcoach* standard to conclude that KL had no standing under Section 1109. **[SPA 19]** This was reversible error.

The Bankruptcy Court also cited *Quigley* in support of its conclusion that KL lacked standing, supposedly because KL "cannot raise the rights of a third party even though it has a financial stake in the case." **[SPA 19]** (*citing Quigley,* 391 B.R. at 705). Again, this was erroneous. KL would not have been attempting to raise the rights of any third party on the 9019 Motion, as KL's financial and legal stake in the 9019 Motion was direct.

The Bankruptcy Court also erred in citing *Austin* and *Integrated* to define a "party in interest" as limited to someone having a *pecuniary interest* in a court order. **[SPA 20].** As discussed above, that is the narrower standard for standing on *appellate review* of a bankruptcy order, not the standard for standing in an original proceeding under 11 U.S.C. § 1109, the applicable standard for deciding KL's standing to be heard on the 9019 Motion.

Doral Ctr., Inc. v. Ionosphere Clubs, Inc. (In re Ionosphere Clubs, Inc.), 208 B.R. 812, (Bankr. S.D.N.Y. 1997), is an example of a proper application of Section 1109 standing. In *Doral*, the District Court, on appeal from the Bankruptcy Court, determined that the Bankruptcy Court appropriately found that the movant had a direct "stake" in the outcome of a settlement agreement subject to approval by the Court and a right "to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest." (citations omitted). Thus, the movant had standing as a party in interest under Section 1109. *Doral*, 208 B.R. at 814.

KL had a direct and unmistakable financial and legal stake in the outcome of the approval of the Settlement Agreement via the 9019 Motion (i.e. at a minimum, KL purports that its due process rights in the D.C. Action are at risk), and therefore had standing to object to the 9019 Motion. To the extent the Bankruptcy Court's ruling that KL had no financial stake is a determination of law, it was erroneous; to the extent that was a finding of fact, the Bankruptcy Court's determination was clearly erroneous, as it ignored the express terms of the Settlement Agreement. **[A56, et.seq.]**

Section 1109 "provides that any 'party in interest' may raise, appear and be heard on 'any issue' in a chapter 11 case. The general theory behind the section is that anyone holding a direct financial stake in the outcome of the case should have

an opportunity (either directly or through an appropriate representative) to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest." 7-1109 Collier on Bankruptcy P 1109.01.

"The term 'parties in interest' applies to those who have an interest in the res which is to be administered." *Larcon Co. v. Wallingsford*, 136 F. Supp. 602, 612 (W.D. Ark. 1955), *aff'd*, 237 F.2d 904 (8th Cir. 1956) (internal quotation omitted). In fact, the "very purpose of FRBP 9019 is to provide creditors and other interested parties with an opportunity to object to stipulations that may *unfairly adversely affect their interest*." *In re Lewis*, 157 B.R. 555, 560 (Bankr. E.D. Pa. 1993) (emphasis added).

KL had a protectable interest that it contends was adversely affected by entry of the Settlement Agreement Order. Thus, KL had standing to object to the 9019 Motion.

Because KL had party-in-interest status under Section 1109, it had the right to be heard on the 9019 Motion, and to intervene as a matter of right under FRBP 7024. *See Smart World Techs., LLC, Inc. v. Juno Online Services (In re Smart World Techs, LLC)*, 423 F.3d 166, 181 (2d Cir. 2005).

In sum, KL had standing under Section 1109 to appear and be heard on the 9019 Motion.

iv. The applicable standing criteria Under The Bankruptcy Code would Have provided vehicles For KL's standing Under 11 U.S.C. § 1109, FRBP 2018 And FRBP 7024.

1. KL had Standing Under FRBP 2018

Because the Settlement Agreement was a springboard for KL's alleged injury which sprung directly from the Settlement Agreement and its approval, KL would have had standing to appear on the 9019 Motion pursuant to FRBP 2018.

Furthermore, if KL did not have standing to appear under Section 1109, it must have, *ipso facto*, obtained standing to permissibly intervene or it would not have been able to appear before the Bankruptcy Court on the Mediation Motion.

FRBP 2018,[6] as distinguished from 11 U.S.C. § 1109 "authorizes certain other entities that may be interested in a chapter 11 case, but that do not qualify as a "party in interest," to participate in the proceedings." 7-1109 Collier on Bankruptcy ¶ 1109.03 (15th ed. Rev. 2009).

> [3] Showing of Cause Required for Intervention
>
> Intervention will be permitted pursuant to Rule 2018(a) upon a showing of cause. *The cause is an economic or similar interest in the case or one of its aspects. . . . Permissive intervention is warranted if the entity demonstrates*

[6] Parallel to this issue of standing under FRBP 2018 and FRBP 7024, this Court has ruled that if a party has standing under Section 1109, such standing may be applied in adversary proceedings as well. *See Caldor, Inc. v. Term Loan Holder Committee (In re Caldor Corporation, Inc.),* 303 F.3d 161 (2d Cir. 2002). Accordingly, standing in an adversary proceeding may be based upon Section 1109, FRBP 2018 and/or FRBP 7024. *Id.* at 171-172.

> *that no other entity exists to adequately protect its position and that intervention would not result in undue delay or prejudice.*

9-2018 Collier on Bankruptcy ¶ 2018.04 (15th ed. Rev. 2009) (emphasis added).

2. KL had Standing Under FRBP 7024

FRBP 7024 (incorporating FRCP 24) provides, in pertinent part:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Bankruptcy Rule 1018 makes Bankruptcy Rule 7024 applicable in all proceedings related to a contested involuntary petition, contested ancillary petitions, and in all proceedings to vacate an order for relief. Bankruptcy Rule 9014 permits the court to apply Bankruptcy Rule 7024 in contested matters. *See* 10-7024 Collier on Bankruptcy ¶ 7024 (15th ed. Rev. 2009).

An intervenor under FRCP 24(a)(2), made applicable to bankruptcy proceedings by Bankruptcy Rule 7024, must meet the following requirements: (1) submit a timely application to intervene; (2) demonstrate an interest in the property of the transaction; (3) show that the intervenor's ability to protect such interest might be impaired; and (4) demonstrate that the interest is not adequately

represented by the existing parties. The intervenor must show that he has a significant interest in the adversary proceeding which is direct, substantial, and legally protectable. *See Vermejo Park Corp. v. Kaiser Coal Corp.* (*In re Kaiser Steel Corp.*), 998 F.2d 783 (10th Cir. 1993).

The burden of proof on a party seeking intervention under FRCP 24 and FRBP 7024 is "minimal." *Asbestos Settlement Trust v. Port Auth. of N.Y. and N.J. (In re Celotex Corp.)*, 377 B.R. 345, 351 (Bankr. M.D. Fla. 2006). It need only show that it had an interest in the subject matter of the suit, that its ability to protect its interest may be impaired by disposition of the suit, and that the existing parties in the suit could not adequately protect its interest. *Id.*

v. KL Had Article III Standing

KL's argument that it did not have Article III standing to appear on the 9019 Motion is belied by KL's admitted standing before the Bankruptcy Court either under Section 1109, FRBP 2018 or FRBP 7024 and under Article III in the Adversary Proceeding with respect to its prosecution of the Mediation Motion. *See Point One, Subsection i, supra.* If KL had Article III standing before the Bankruptcy Court to file the Mediation Motion (for which the claimed injury arose out of the purported assignment of the D.C. Proceeds to the Representative), it must have had Article III standing to object to the 9019 Motion.

Ultimately, regardless of KL's protestations to the contrary, it had Article III standing before the Bankruptcy Court on the 9019 Motion because the entry of the Settlement Agreement Order created "concrete and particularized" and "actual or imminent" injury that can be fairly traced to the approval of the Settlement Agreement, *Lundy v. Hochberg*, 91 Fed. Appx. 739, 742 (3d Cir. 2003), as set forth in KL's briefs filed in the District Court Appeal. *KL Reply Appeal Brief* [U.S.D.C. Docket No. 09-9674, ECF Doc.# 29 at 4].

KL also satisfied the Article III standing requirements in that KL could demonstrate (a) injury in fact that is actual or imminent rather than conjectural or hypothetical; (2) the injury is "fairly traceable" to the conduct complained of (i.e. the approval of the 9019 Motion and corresponding Settlement Agreement); (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision (i.e. failure to approve the Settlement Agreement compelling Mandl to commence the D.C. Action and authorizing the Representative's rights in the D.C. Proceeds). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Furthermore, contrary to the Bankruptcy Court's holding **[SPA 18]**, KL also had prudential standing because KL would have appeared to protect its own interests and rights, not that of any third party. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975).

KL also claims it has been injured by the Mediation Order and the Settlement Agreement Order because it will be denied due process if it is unable to delve into the Mediation proceedings, and because the "gross-up" provision and the allegations of collusion, if not fully examined in the D.C. Action, risk entry of a larger judgment against KL. **[A346, et.seq.]**

KL asserts that neither of the above injuries is hypothetical or conjectural for purposes of standing. Furthermore, KL fails to address the injury that it has and continues to incur arising from its obligation to expend legal fees in connection with the D.C. Action, in addition to the real risk of entry of judgment in the D.C. Action.

vi. Standing would Have been afforded Under All Statutory Vehicles, As effectively conceded by KL's appearance/intervention in the Adversary Proceeding To Bring The Mediation Motion

Inasmuch as standing was afforded KL by the Bankruptcy Court to appear on the Mediation Motion, KL, *ipso facto*, had standing to appear on the 9019 Motion.

In particular, (1) KL was a party in interest to appear on the 9019 Motion because it had both a financial and legal interest in the outcome of the 9019 Motion, and efforts by KL to address these interests would adversely affect the Representative's rights in the Settlement Agreement; (2) KL could have intervened under FRBP 2018 arising from its economic interest impacted by approval of the

9019 Motion; and (3) KL could have intervened under FRBP 7024 because (a) KL had an interest in the subject matter of the 9019 Motion, (b) KL concedes that its ability to protect that interest has been impaired by the disposition of the 9019 Motion[7] [KL Brief filed in U.S.D.C, Docket No. 09-9674, ECF Doc.#29] and (c) the existing parties (Mandl and the Representative) would not adequately protect that interest inasmuch as both supported approval of the 9019 Motion, and both had an interest in the success of Mandl's lawsuit against KL mandated under the Settlement Agreement.

Of course, KL, aware it had standing in the Adversary Proceeding, later intervened in the Adversary Proceeding to bring its Mediation Motion as reflected on the Bankruptcy Court ECF docket (03-2523, Doc. No. 227) **[A33]** in which KL filed its Mediation Motion styled as and coupled with a "Motion to Intervene." **[A33]** Thus, KL concedes that it had standing to intervene in the Bankruptcy Court, and it follows that it had standing to intervene and object to the 9019 Motion.

Ultimately, KL made a strategic decision not to appear and object to the 9019 Motion so that it could, after the approval of the 9019 Motion, proceed in the D.C. Action as a purported non-party to the Adversary Proceeding unfettered by

[7] This is because of (1) the fact that the D.C. Action had been filed *prior to the filing* of the 9019 Motion and, thus, the commencement of the D.C. Action was not speculative or hypothetical; (2) the requirement that KL expend legal fees in the defense of the D.C. Action, without regard to whether a judgment is ultimately entered against it; and (3) KL's allegations that Section 5 of the Settlement Agreement violates public policy.

the Settlement Agreement Order. Thus, KL purported to arrive in the D.C. Action with a clean slate to try to persuade the D.C. Superior Court to void and dismiss the *entire* D.C. Action (not just as against the Representative's rights in the proceeds) as set forth in its Answer, which states: "The claims that Mandl assert are barred as an unlawful assignment, which occurred in his settlement with the Representative in the adversary proceedings." **[A488]**

POINT TWO

UNITED STUDENT AID FUNDS V. ESPINOSA, DECIDED AFTER THE BANKRUPTCY DECISION AND AFTER BRIEFING COMPLETED IN THE DISTRICT COURT, CONFIRMS THAT KL HAD ONLY ONE AVENUE OF RELIEF FROM THE SETTLEMENT AGREEMENT ORDER

The proper route to registering an objection to the Settlement Agreement would have been to file a written objection to the 9019 Motion, and appear at a hearing to pursue the objection. To the extent KL seeks, after the fact, to void aspects of the Settlement Agreement and the Settlement Agreement Order, the only avenue to void or modify a final order is via FRCP 60. *United Student Aid Funds, Inc. v. Espinosa*, ____ U.S. ____, 130 S.Ct. 1367 (2010).

As explained in *Espinosa*,

> "[A] Bankruptcy Court's orders following the conclusion of direct review" would "stan[d] in the way of challenging [their] enforceability" *Travelers Indemnity Co. v. Bailey*, 557 U.S. ____, ___, 129 S.Ct. 2195, 2198, 174 L.Ed. 2d 99, 103 (2009) (slip op. at 1-2). Rule 60(b), however, provides an "exception to finality," *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005), that "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances., *id.*, at 528. Specifically, Rule 60(b)(4) -- the provision under which United brought this motion -- authorizes the court to relieve a party from a final judgment if "the judgment is void" (footnote omitted).

Espinosa, 130 S.Ct. at 1376.[8]

> Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. [citations omitted].

Espinosa, 130 S.Ct. at 1377.

Thus, *Espinosa* reinforces two legal mandates under FRCP 60(b): (1) Parties challenging a bankruptcy court's final order must take a direct appeal or forever be barred from collateral attack, even when the order contains a clear legal error, and (2) Rule 60(b)(4) applies only in exceptional cases, i.e., only when a judgment is premised on (a) a certain type of jurisdictional error when the court lacks even an

[8] FRCP 60(b)(3) provides that a court may grant relief from an order upon a finding of fraud or misconduct by an opposing party. KL alleges that the Settlement Agreement Order should be voided for two reasons: (1) KL alleges that the Appellant's right to 50% of the D.C. Proceeds is an improper assignment of the Mandl malpractice claim against KL, and (2) KL alleges that Mandl and the Representative engaged in collusion in connection with the "gross-up" provision in the Settlement Agreement. Accordingly, KL could have, arguably, proceeded under Rule 60(b)(3) or (4).

Of course, given the more than two (2) years since the approval of the Settlement Agreement and KL's decision to seek relief in the D.C. court, KL long ago waived any right to obtain relief under FRCP 60 in any event.

arguable basis for jurisdiction, or (b) a violation of due process that deprives a party of notice or the opportunity to be heard.

Similarly, a motion under Rule 60(b)(4) is not a substitute for a timely appeal. *Espinosa,* 130 S.Ct. at 1377.

Espinosa also stands for the proposition that legal error by a bankruptcy court (e.g., failing to make required findings of hardship when approving a discharge of student loans) cannot provide a basis to void an order under Rule 60(b)(4). *Espinosa,* 130 S.Ct. at 1379-80. Accordingly, regardless of the Bankruptcy Court's statement at the hearing on the Cross-Motion (relied upon by the District Court **[SPA 46] [A558])** that it did not consider or render a decision on whether or not the Representative's rights in the D.C. Proceeds constituted an improper assignment of a malpractice claim, such a purported failing is not fatal to the enforceability of the Settlement Agreement and the Settlement Agreement Order. *Cf. Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee),* 193 F.3d 1083, 1086 (9th Cir. 1999) ("This court has recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions.")

With respect to allegations by KL of collusion by Mandl and the Representative in connection with the negotiation and execution of the Settlement Agreement and the approval and entry of the Settlement Agreement Order, allegations based on terms of the Settlement Agreement that KL says are unfairly

skewed to the detriment of KL **[A109-132, 346-389],** KL could and should have asserted these claims by filing an objection to the 9019 Motion. Such an allegation would have gone to the heart of the 9019 Motion which, among other things, required a showing of good faith, arms-length negotiations by the parties. *Plaza Equities LLC, v. Pauker (In re Copperfield Investments, LLC),* 401 B.R. 87, 92 (Bankr. E.D.N.Y. 2009). Putting aside that KL received full due process arising from actual notice of the 9019 Motion **[SPA 7],** KL could never satisfy the criteria for relief from an order under FRCP 60(b)(3) arising from purported fraud. Given KL's inability to move under FRCP 60(b)(3) and to satisfy the required criteria thereunder,[9] and given *Espinosa's* explicit recognition that a party may only seek relief from a final order of the Bankruptcy Court via Rule 60(b), KL's attempt to collaterally attack the Settlement Agreement and Settlement Agreement Order must be enjoined.

The Settlement Agreement Order expressly sets forth the right of the Representative to avail itself of "*all the rights and privileges set forth in the Settlement Agreement" and to "take all such action necessary under the Settlement Agreement to effectuate the Settlement Agreement.*" **[A104]** The Settlement Agreement expressly states that the Representative's interest in the D.C Proceeds

[9] Under FRBP 9014, had KL filed an objection, the 9019 Motion would have been treated as a contested action, and KL could have engaged in discovery and examined and cross-examined witnesses at a hearing on a 9019 Motion.

"does not constitute in any manner an assignment of Mandl's claim against K&L Gates to the Representative or any other party." [A73]

Moreover, New York law governs the Settlement Agreement **[A80]**, and the assignment of a malpractice claim is permissible in any event under New York law. *See fn.10 infra*.

The Bankruptcy Court necessarily had to decide that the D.C. Proceeds and "gross-up" provisions (in addition to all other provisions of the Settlement Agreement) were valid **[A103,** First Decretal paragraph.**]**, as a condition precedent to approving the Settlement Agreement, as well as the fact that "[t]he Agreement shall be governed, as applicable, by the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and by the substantive laws of the State of New York, without regard to conflicts of law principles." **[A80]**. The "gross-up" and D.C. Proceeds provisions were both expressly disclosed in the 9019 Motion. **[A38-85]**

Manifestly, the DC Proceeds provision and the D.C. Action were explicitly described by the Representative in the 9019 Motion as significant influences on the Representative's decision to settle, on the likelihood, described in the 9019 Motion, that Teligent's estate would share in a judgment in excess of $20 million in an action in which Mandl had a strong likelihood of prevailing. **[A52-54]**. Finally, as the Settlement Agreement expressly stated that "Mandl's agreement to make the Third Payment to the Representative upon the final resolution of the

K&L Gates Action does not constitute in any manner an assignment of Mandl's claim against K&L Gates to the Representative or any other party," **[A73]**, this issue was directly before the Bankruptcy Court and the factual finding and validity of this provision was also approved by the Bankruptcy Court.[10]

Because the Bankruptcy Court ruled on and approved the validity of the Settlement Agreement, any claims that could have been raised by KL may not be relitigated, under the doctrine of *res judicata*.

At bottom, the express choice of New York law in the Settlement Agreement would allow the assignment of a malpractice claim, even if the Representative's 50% interest in the D.C. Proceeds were deemed an assignment.[11]

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[10] The assignment of a right in proceeds from a malpractice action (and the assignment of the action itself) is permissible under New York law (*See Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt International B. V. v. Schreiber*, 407 F.3d 34, 47 (2d Cir. 2005); *Even Street Productions, Ltd. v. Shkat Arrow Hafer & Weber*, 643 F. Supp. 2d 317 (S.D.N.Y. 2008), *citing Greevy v. Becker*, 240 A.D. 2d 539 (2d Dept 1997), which is the law applicable to interpretation and enforcement of the Settlement Agreement by its express terms **[A80]** and pursuant to FRBP 7069 which compels the application of New York law (i.e. where the Bankruptcy Court sits and enters judgment upon enforcement). The Bankruptcy Court specifically referenced New York law in the Bankruptcy Decision with respect to allowance of assignment of such claims under New York law **[SPA 21,fn.6]**. The Bankruptcy Court necessarily believed that New York law is applicable, particularly since it could not have approved the Settlement Agreement if any provision of it violated public policy, as a court is required to address public policy considerations when determining whether to approve a settlement so as to promote the integrity of the judicial system. *In re Smith*, 926 F.2d 1027 (11th Cir. 1991); *In re Engman*, 395 B.R. 610, 626 (Bankr. W.D. Mich. 2008); *In re Dow Corning Corp.*, 2003 Bankr. Lexis 787, at *2 (Bankr. E.D. Mich. July 17, 2003) ("The court must make the following inquiries in approving a compromise or settlement: (1) whether the proposed settlement includes provisions which if enforced, would be illegal or against public policy"); *In re Bates*, 211 B.R. 338, 342 (Bankr. D. Minn. 1997); *Moch v. East Baton Rouge Parish School Board*, 533 F. Supp. 556 (M.D. La. 1980).

[11] Where a Court has entered an order reflecting a choice of law provision, a party or bound non-party may not seek application of a different state's laws in a state court. *See Olin Corporation v. Ins. Co of North America*, 807 F. Supp. 1143, 1153 (S.D.N.Y. 1992). Moreover, where a party asserts claims in a state court action to

Accordingly, even if KL had filed a motion under FRCP 60 (again, the only route to voiding or obtaining relief from a final order of the Bankruptcy Court), KL could not have satisfied the FRCP 60 criteria because KL was timely served with the 9019 Motion, and the Bankruptcy Court's purported failure to expressly rule on the Representative's rights to the D.C. Proceeds does not negate the express rights that the Representative obtained under the Settlement Agreement Order; namely, the express Bankruptcy Court mandate that the Representative "shall have all rights and privileges set forth in the Settlement Agreement" and "the Representative is authorized to take all such action necessary under the Settlement Agreement to effectuate the Settlement Agreement." **[A103-104]**

As the Supreme Court stated in *Espinosa*:

> Rule 60(b)(4) *does not provide a license for litigants to sleep on their rights*. United had ***actual notice*** of the filing of Espinosa's plan, its contents, and the Bankruptcy Court's subsequent confirmation of the plan. [] United therefore forfeited its arguments regarding validity of service or the adequacy of the Bankruptcy Court procedures ***by failing to raise a timely objection*** with the court. . . .
>
> Where, as here, ***a party is notified*** of the plan's contents and ***fails to object*** to confirmation of the plan before the time for appeal expires, ***that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief***. *We*

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defeat a federal court order, an injunction may be issued to enjoin the party from proceeding in the state court action. *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 248-9 (2d Cir. 1961). Accordingly, KL's stated intent to seek to have the court in the D.C. Action apply a U.S. District Court for the District of Columbia decision (*Edens, 675 F. Supp. 2d 75* (D.D.C. 2009), *see KL's Brief , U.S.D.C. Docket No. 09-9674, Doc. No. 29)* in the face of applicable New York law, to collaterally attack the Settlement Agreement and Settlement Agreement Order, is prohibited.

> *thus agree with the Court of Appeals that the Bankruptcy Court's confirmation order is not void*.

Espinosa, 130 S.Ct. at 1380 (emphasis added).

Here, KL failed to appear and be heard on the 9019 Motion, failed to take an appeal of the approval of the 9019 Motion and failed to seek relief from the Settlement Agreement Order under the only route permitted (i.e., FRCP 60). KL must be enjoined from seeking to circumvent FRCP 60 and *Espinosa's* mandate.

In sum, the Bankruptcy and District Courts erred in ruling that KL did not have standing to object to the 9019 Motion. The Orders of the Bankruptcy Court and the District Court should be reversed.

POINT THREE

THE BANKRUPTCY COURT ERRED IN REFUSING TO ENJOIN KL UNDER PRINCIPLES OF *RES JUDICATA* AND THE "RELITIGATION EXCEPTION" TO THE ANTI-INJUNCTION ACT

In its Cross-Motion, the Representative sought entry of an order enjoining KL from attempting in the D.C. Action to void any portion of the Settlement Agreement. Inasmuch as KL, despite receiving electronic notice, elected not to object to the 9019 Motion, thus choosing not to raise the issue of whether the Representative's rights in the D.C. Proceeds under the Settlement Agreement should be voided, KL should be enjoined from now raising this issue in the D.C. Action.

As a threshold issue, entry of an order under FRCP 9019 constitutes a final order and binds all parties in interest and potential permissible intervenors under principles of *res judicata*. *Ades-Berg Investors v. Breedon (In re Bennett Funding Group, Inc.)*, 439 F.3d 155 (2d Cir. 2006).

Moreover, a party in interest under Section 1109 and FRBP 7024(a), or a party who is given or who may seek permission to intervene under FRBP 2018 and/or 7024(b), is endowed with the right to pursue an appellate challenge to an adverse judgment entered in the Bankruptcy Court. *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136 (1st Cir. 1992).[12] "Generally speaking, the term 'parties' as used in connection with the doctrine of res judicata includes all who are directly interested in the subject matter of the suit and have a right and are given an opportunity to make a defense, control the proceedings, examine, and cross-examine witnesses." *Larcon*, 136 F. Supp. at 616. *See also In re Wilcher*, 56 B.R. 428, 438 (Bankr. N.D. Ill. 1985).

[12] While *Kowal* holds that a party-in-interest does not have an absolute right to intervene in an adversary proceeding, this Court rejects this position. *See Smart World Techs, LLC v. Juno Online Services (In re Smart World Techs, LLC)*, 423 F.3d 166, 181 (2d Cir. 2005).

i. The Settlement Agreement and Settlement Agreement Order are Contracts Containing Unambiguous Terms and Must be Enforced

Where the plain terms of a court order apply unambiguously, as they do here, they are entitled to their effect. *The Travelers Indemnity Company v. Pearlie Bailey*, 2009 U.S. LEXIS 4537, 129 S.Ct. 2195, 2204 (2009).

> If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, *see* 11 R. Lord, Williston on Contracts Section 30:4 (4th Ed. 1999), it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms.

Id.

> Once the Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became *res judicata* to the "parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." (citations omitted).

Id., 129 S.Ct. at 2205.

The Settlement Agreement Order expressly provided that the Representative "is authorized to take all such action necessary under the Agreement to effectuate the Agreement" and "shall have all rights and privileges set forth in the Agreement." **[A103-104]**

While a court's interpretation of its orders is typically given deference, *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995), such deference is only appropriate where the court drafts the order. *Contrarian*, 600 F.3d at 252 (the

reason for deferring to a court interpreting its own order as "premised on the truism that the draftsman of the document is uniquely situated to understand the intended meaning of that document.") As the Settlement Agreement and Settlement Agreement Order were drafted by the Appellant (**[A82-85, 103]**) and not by the Bankruptcy Court, it is respectfully submitted that this Court should accord no deference to the Bankruptcy Court's interpretation of the Settlement Agreement or the Settlement Agreement Order, and that these documents must be reviewed *de novo* and enforced by this Court pursuant to the order's and agreement's express terms. *Id*.

ii. KL may not seek To void Any part Of The Settlement Agreement In The D.C. Superior Court On The bases Of lack Of good faith Or collusion In The Bankruptcy Court

At the May 12, 2009 Hearing on the Cross-Motion and the Mediation Motion, KL admitted that it intended to seek to void provisions of the Settlement Agreement (i.e., the "gross-up" recital and the D.C. Proceeds provision) in the D.C. Action, based upon KL's allegation that Mandl and the Representative engaged in collusion or improper conduct in the Bankruptcy Court in reaching the terms of the Settlement Agreement. **[A567]**.

Because this contention is based on KL's dissatisfaction with the terms of the Settlement Agreement, KL necessarily knew of this issue at the time of the 9019 Motion. It was, therefore, incumbent upon KL – the victim of the putative

collusion – to come forward in response to the 9019 Motion, and set forth its challenge to the Settlement Agreement. KL elected to hold back its contention of collusion in the hope of finding a more sympathetic audience in the D.C. Superior Court, where the D.C. Action was already pending. KL has no right to seek relief from the alleged "collusion" in any court other than the Bankruptcy Court. It was error for the Bankruptcy and District Courts to fail to recognize this, and it was error for the Bankruptcy and District Courts not to enjoin KL from pursuing its collateral attack in another court.

Ultimately, because the Bankruptcy Court implicitly determined that the Settlement Agreement was drafted in good faith as a basis upon which to approve the Settlement Agreement, KL's attempt to revisit this issue in the D.C. Action alleging fraud and/or collusion by the Representative and Mandl, is clearly precluded under principles of *res judicata*.[13]

iii. KL, Which Had Standing And Which Could Have Appeared With Respect To The 9019 Motion, Should Be Precluded From Raising Issues In The D.C. Superior Court Which Should Have Been Raised Before The Bankruptcy Court

As discussed above, because KL had *standing* to appear on the 9019 Motion, it had an obligation to appear and object to the D.C. Proceeds provision or to any other aspect of the Settlement Agreement that affected KL at that time, including

[13] Allegations of fraud and collusion in connection with the negotiation and drafting of the Settlement Agreement would have gone to the heart of the 9019 Motion which, among other things, required a showing of good faith, arms-length negotiations by the parties. *Plaza Equities LLC, v. Pauker (In re Copperfield Investments, LLC)*, 401 B.R. 87, 92 (Bankr. E.D.N.Y. 2009).

raising the purported collusion that invalidates the Settlement Agreement, or else waive the opportunity to assert such objections. KL's decision not to appear on the 9019 Motion and object to any aspect of the Settlement Agreement compels the imposition of claim and issue preclusion and an injunction against KL from raising this issue in the D.C. Action. It was error for the Bankruptcy Court not to grant this relief. *See* Point One, *supra*.

Although the Bankruptcy Court ruled that the "relitigation exception" to the Anti-Injunction Act applies only "when the state court is presented with an issue that was previously presented to and decided by the federal court," **[SPA 24]** this holding is erroneous. The relitigation exception of the Anti-Injunction Act applies to all issues that would be precluded by the doctrine of *res judicata*, whether decided or not. *See Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 868-870 (9th Cir. 1992), *amended,* 1992 U.S. App. Lexis 14240 (9th Cir. Jun. 23, 1992).

Res judicata (encompassing claim and issue preclusion) provides that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been raised in that action*." *See Leather v. Ten Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (citations and quotations omitted) (emphasis added). *Res Judicata* supports the policy goal of finality in judicial proceedings. *Southern Pacific RR Co. v. U.S.,* 168 U.S. 1, 49 (1897). Claim preclusion applies to all claims that "*could have been brought in the*

particular bankruptcy proceeding" . . . The court's inquiry is whether there is an "essential similarity of the underlying events" between the second cause of action and the first. *Corestates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 202 (3d Cir. 1999); *accord El Bohio Pub. Dev. Corp. v. Giuliani*, 208 F.3d 202, 2000 WL 326406, at *2 (2d Cir. March 28, 2000) (unpublished).

As a final judgment of the Bankruptcy Court, the Settlement Agreement Order **[A103]** precludes any claims that could have been brought by the parties to the proceedings. *See* 10-9019 Collier on Bankruptcy ¶ 9019.01 ("Once it has become final, an order approving a settlement agreement has the same *res judicata* effect as any other order of a court."); *see also In re Lewis*, 157 B.R. 555, 561 (Bankr. E.D. Pa. 1993); *accord, Adam v. Itech Oil Co (In re Gibraltar Resources, Inc.)*, 210 F.3d 573 (5th Cir. 2000). For purposes of *res judicata*, a party to a Bankruptcy proceeding includes "all who are directly interested in the subject matter and who have a right to make defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment if an appeal lies. (citation omitted)" *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1550-51 (11th Cir. 1990). Parties in interest under Section 1109 constitute "parties" to bankruptcy proceedings for *res judicata* purposes. *Id.* at 1151; *see also In re Diana Lynn Harvey*, 213 F.3d 318, 322 (7th Cir. 2000) ("a creditor is not entitled to stick its head in the sand and pretend it would not lose any rights by not

participating in the proceedings."); *Sanders Confectionary Products Inc. v. Heller Financial Inc.*, 973 F.2d 474, 481 ("To interpret the term 'party' narrowly would also run counter to the provisions in the Code which … offer methods for challenging bankruptcy orders.").

A party in interest under Section 1109 and FRBP 7024(a), or a party who is given or who may seek permission to intervene under FRBP 2018 and/or 7024(b), is endowed with the right to pursue an appellate challenge to an adverse judgment entered in the Bankruptcy Court. *Kowal v. Malkemus (In re Thompson)*, 965 F.2d at 1136. "Generally speaking, the term 'parties' as used in connection with the doctrine of res judicata includes all who are directly interested in the subject matter of the suit and have a right and are given an opportunity to make a defense, control the proceedings, examine, and cross-examine witnesses." *Larcon,* 136 F. Supp.at 617.

KL received notice of the hearing on the 9019 Motion. It had every opportunity to file an objection and be heard. Accordingly, contrary to KL's argument that it was denied due process because it had no right to appeal the Settlement Agreement Order entered on the 9019 Motion, had KL appeared, and assuming the 9019 Motion was granted despite KL's objection, KL would have had the right of appeal. Because KL received notice of the 9019 Motion, would have been afforded the right of appeal, and because the same issues are implicated

with respect to the 9019 Motion and the D.C. Action, principles of *res judicata* preclude KL from relitigating the issues it chose not to litigate in the 9019 Motion.

iv. The Bankruptcy Court Ruled On The Validity And Enforceability Of All The Terms Of The Settlement Agreement

As a matter of law, the Bankruptcy Court actually decided these issues raised by KL, and KL, which had an opportunity to be heard, is bound by the Settlement Agreement Order. An order approving a settlement agreement constitutes a final judgment of the Bankruptcy Court. *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 861 (E.D.N.Y. & S.D.N.Y. 1991) *vacated on other grounds,* 982 F.2d 721 (2d Cir.1992), *modified on reh'g,* 993 F.2d 7 (2d Cir.1993). If the Bankruptcy Court did not, as a matter of law, approve all terms and rights set forth in the Settlement Agreement (whether detailed in the Settlement Agreement Order or not), a court-ordered settlement agreement would not serve the necessary purpose, i.e., providing a definitive end to litigation in which the parties' rights, expressed in a contract, are approved by the Court and binding on those provided with notice and an opportunity to be heard in opposition. *See Rinehart v. Stroud Ford, Inc. (In re Stroud Ford, Inc.)*, 205 B.R. 722, (Bankr. M.D. Pa. 1996) (bankruptcy court approval *renders a settlement agreement enforceable*).It is not correct, as the Bankruptcy and District Courts ruled **[SPA 21, 48],** that, merely because the jury's verdict in the D.C. Action could be zero dollars, this possibility alone somehow negates all of the Representative's negotiated and court-approved

rights under the Settlement Agreement. Rather, to the extent Mandl recovers a judgment against KL that exceeds zero dollars, the Representative has obtained a contractual, court-ordered right, governed by New York law **[A78]** to receive 50% of the D.C. Proceeds, and has a right to enforce the D.C. Proceeds provision for the benefit of Teligent's unsecured creditors. *See Sweeney v. Heller & Co. (In re American Plastics Corp.)*, 102 B.R. 609 (Bankr. W.D. Mich. 1989).

Where "judicial approval was necessary for a transaction to go forward, an agreement could not be binding absent the required approval." *In re Frye*, 216 B.R. 166 (Bankr. E.D. Va. 1997).

Furthermore, contrary to KL's allegations that the Bankruptcy Court approved the Settlement Agreement *without regard to its legality*, when considering approval of a settlement agreement under Rule 9019, a court must take into consideration whether an agreement is lawful:

> Parties to settlement agreements are entitled to some certainty that the agreement entered into is valid and will be effective and enforceable if the bankruptcy court approves it. To hold otherwise would be contrary to the principles of contract formation and contrary to the strong public policy favoring the settlement of disputes.

Musselman v. Stanonik (In Seminole Walls & Ceilings Corp.), 388 B.R. 386 (M.D. Fla. 2008).

In light of the foregoing, the Bankruptcy Court was duty-bound to determine, and thus did, by operation of law, that the Settlement Agreement was

and is a lawful agreement. As such, the legality of the Settlement Agreement may not be collaterally attacked. In fact, the Settlement Agreement Order expressly provides that:

> [T]his Court *having determined that the legal and factual bases set forth in the Motion* established just cause for the relief granted herein.
>
> The Agreement is hereby approved pursuant to Bankruptcy Rule 9019 and the Procedures Order and *the Parties to the Agreement shall have all the rights and privileges set forth in the Agreement*…
>
> The *Representative is authorized to take all such action necessary under the Agreement to effectuate the Agreement*.

[A103-104] (emphasis added)**.**

v. The Bankruptcy Court Misapplied Court Rulings Regarding 9019 Motion Standards of Review

The Bankruptcy Court erroneously cited *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983), for the proposition that it need not have ruled on each of the provisions set forth in the Settlement Agreement because it "does not decide the numerous questions of law and fact," and concluded that it did not review the Settlement Agreement to determine the validity of its provisions before approving it. **[SPA 21]**[14] *Cosoff* cites to *Newman v. Stein,* 464 F.2d 689, 692 (2d Cir. 1972). The *Newman* court explained a Bankruptcy Court's duty of review on a 9019 motion:

[14] The Bankruptcy Court did not state that it had an independent recollection of not considering the validity of the provisions of the Settlement Agreement.

> "it is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." Thus, appellate courts have rejected approval of settlements where the trial court acted without sufficient facts concerning the claim, see, e.g., *Ashbach v. Kirtley*, 289 F.2d 159, 163-166 (8th Cir. 1961), *or failed to allow objectors to develop on the record facts going to the propriety of the settlement*, see, e.g., *Cohen v. Young*, 127 F.2d 721, 725-726 (6th Cir. 1942).

Id. (citation omitted) (emphasis supplied).

In *Cosoff*, this Court also referenced the so-called *TMT Rule*,[15] under which a bankruptcy court, on a 9019 motion, need not conduct a "mini-trial" on the claims and allegations in the settled adversary proceeding (as opposed to the terms of the settlement agreement and objections thereto) to ascertain if the subject settlement is in the best interests of the estate. *TMT* compels a bankruptcy court to consider all objections filed to a 9019 motion and to allow a full record on the objections to be made. This Court ruled in *Cosoff* that the subject trustee need not have reviewed all available documentation supporting its claim in the subject adversary proceeding to justify the settlement to the bankruptcy court, and the bankruptcy court *need not hold an evidentiary mini-trial to ascertain the likelihood of success in the adversary proceeding*. *However, approval of settlements require the bankruptcy court to act with sufficient facts concerning the complaint and*

[15] TMT was superseded on different grounds by promulgation of FRBP 9019 in 1980 with the enactment of the Bankruptcy Code. *See In re Foundation for New Era Philanthropy*, 1996 Bankr. Lexis 1891 (Bankr. E.D. Pa. July 22, 1996).

objectors to develop on the record facts going to the propriety of the settlement. *Cosoff*, 424 F.2d at 692.

The Bankruptcy Court necessarily had to decide that the D.C. Proceeds and "gross-up" provisions (in addition to all other provisions of the Settlement Agreement) were valid, as a condition precedent to approving the Settlement Agreement, as well as the fact that "[t]he Agreement shall be governed, as applicable, by the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and by the substantive laws of the State of New York, without regard to conflicts of law principles." **[A78]** The "gross-up" and D.C. Proceeds provisions were both expressly disclosed in the 9019 Motion. **[A52-54]** Both were described in detail to the Court, with the basis for and explanation of each provision. Moreover, the D.C. Proceeds provision and the D.C. Action were explicitly described by the Representative in the 9019 Motion as significant influences on the Representative's decision to settle, on the likelihood, described in the 9019 Motion, that Teligent's estate would share in a judgment in excess of $20 million in an action in which Mandl had a strong likelihood of prevailing. **[A52-54]**.

Finally, as the Settlement Agreement expressly stated that "Mandl's agreement to make the Third Payment to the Representative upon the final resolution of the K&L Gates Action does not constitute in any manner an assignment of Mandl's claim against K&L Gates to the Representative or any other

party," **[A73]** this issue was directly before the Bankruptcy Court and the factual finding and validity of this provision was also approved by the Bankruptcy Court.

Because the Bankruptcy Court ruled on and approved the validity of the Settlement Agreement, any claims that could have been raised by KL may not be relitigated under the doctrine of claim preclusion.

In sum, because KL was a party in interest to, and had standing to intervene in, the proceedings on the 9019 Motion, the Settlement Agreement Order precludes KL from litigating in another forum those claims that it could have raised in the Bankruptcy Court proceedings.

POINT FOUR

THE COURTS BELOW ERRED IN REFUSING TO ENJOIN KL UNDER THE SUPREMACY CLAUSE, THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT, AND PRINCIPLES GOVERNING PRE-EMPTION

Federal courts have ancillary and enforcement jurisdiction to enforce their judgments, even as against assets of a judgment debtor in the hands of a third party. *Epperson v. Entertainment Express, Inc.*, 242 F.3d 100, 106-107 (2d Cir. 2001).

Given that, *at the time of the Bankruptcy Decision*, (1) KL did not identify which state's law it believed was applicable to the Representative's rights in the D.C. Proceeds, (2) New York law allows the assignment of proceeds from a tort

action,[16] and (3) D.C. law was also not in conflict with the D.C. Proceeds provision of the Settlement Agreement, the Bankruptcy Court determined that because there were no applicable state laws in conflict with the D.C. Proceeds provision of the Settlement Agreement, the Representative's arguments with respect to the Supremacy Clause and pre-emption were "speculative." **[SPA 22-23]**

However, since the entry of the Bankruptcy Decision, KL has disclosed the issuance of a recent U.S. District Court decision in the District of Columbia, *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75 (D.D.C. 2009), on which KL intends to rely to void provisions of the Settlement Agreement.

Given the issuance of the *Edens* decision and KL's stated objective to rely on *Edens* to void the Representative's rights under the D.C. Proceeds provision of the Settlement Agreement, KL now concedes that a conflict of law exists with respect to the enforcement of the express terms of the Settlement Agreement (i.e., D.C. law versus New York, applicable pursuant to FRCP 69), thus implicating the Supremacy Clause and pre-emption issues which the Bankruptcy Court held were not ripe at the time of its Decision. **[SPA 22]**

[16] The Representative does not concede that the D.C. Proceeds provision constitutes an "assignment." Inasmuch as KL contends that the D.C. Proceeds provision constitutes an assignment, this section will assume, *arguendo*, that it does.

i. The Conflict Between D.C. Law And FRCP 69

FRCP 69 provides, in relevant part:

> ***(a) In General.*** (1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — *must accord with the procedure of the state where the court is located,* but a federal statute governs to the extent it applies.

FRCP 69(a)(1) (emphasis added).

The Judgment was issued out of and remains docketed in the Bankruptcy Court in New York. Pursuant to the express provisions of the Settlement Agreement, partial satisfactions have been and continue to be filed upon the remittance of payments due under the Settlement Agreement. **[A71]**

As contemplated by the Bankruptcy Decision, **[SPA 25]** (recognizing the enforceability of the Settlement Agreement)**,** because the Judgment still remains docketed, the Representative had and retains rights to enforce the Settlement Agreement Order (and resulting judgment) in the event of default under the Settlement Agreement pursuant to *New York* law (i.e. pursuant to FRCP 69, the law of the state in which the Bankruptcy Court sits). **[SPA 22, n.6]**

Prior to entering into the Settlement Agreement, the Representative also had the right to enforce the Judgment against Mandl's property pursuant to *New York law* via application of FRCP 69. Thus, the Representative could have enforced the Judgment against 100% of the proceeds that Mandl would receive from the D.C.

Action, for example by delivering an execution to the sheriff under CPLR 5202 and 5230, serving Mandl and KL with restraining notices under CPLR 5222, having the sheriff levy and execute under CPLR 5232 and 5201(b),[17] and instituting turnover proceedings under CPLR 5225 and 5227.

To resolve the Adversary Proceeding, however, the Representative agreed to allow Mandl to retain 50% of the D.C. Proceeds. In other words, what is being described by KL as an "assignment" by Mandl to the Representative of 50% of the net proceeds of his lawsuit against KL, is actually something very different: Viewed against the backdrop of the CPLR (made applicable via FRCP 69), it is the Representative who agreed to relinquish part of its right to collect 100% of the net proceeds of the lawsuit (up to the face amount of the Judgment, plus post-judgment interest).

Putting aside whether or not the D.C. Proceeds provision of the Settlement Agreement is an "assignment," New York law permits the proceeds of a tort claim to be equitably assigned in advance of judgment or settlement, treating the "assignment" as an executory contract for the transfer of a future fund enforceable by specific performance. *See Bernstein v. The Greater New York Mutual Insurance Co.*, 706 F. Supp. 287 (S.D.N.Y. 1989).

[17] CPLR 5201(b) provides: "*Property against which a money judgment may be enforced*. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment ..."

The Settlement Agreement was therefore a compromise of rights accorded the Representative as Judgment Creditor under CPLR Article 52, made applicable by FRCP 69. Accordingly, the right to enforce the Judgment and Settlement Agreement Order arises under New York law. Inasmuch as the provisions of the Settlement Agreement directly serve to satisfy the Judgment, rights under the Settlement Agreement Order and the right to enforce them are, likewise, governed by New York law.

Notwithstanding the applicability of New York law to the execution of the Judgment and enforcement of the Settlement Agreement pursuant to New York law, KL has disclosed its express intent to seek a ruling that D.C. law (and the *Edens* decision explicitly) compels the voiding of the Representative's rights under the D.C. Proceeds provision of the Settlement Agreement.

The Bankruptcy Court ruled that property rights in the Bankruptcy Court are determined by application of state law. **[SPA 23,** citing *Butner v. United States*, 440 U.S. 48, 55 (1979)]. That reasoning, and the *Butner* decision on which it is based, applies to the property rights of the Representative arising out of the Judgment, and defined under FRCP 69 and CPLR Article 52.[18]

[18] The Settlement Agreement explicitly provides that it is governed by New York law. [**A80, §23]** Moreover, the alleged assignment of the D.C. Proceeds renders the assignment and the future interest in proceeds property of Teligent's estate pursuant to 11 U.S.C. § 541(a)(4) and (7), over which such property the Bankruptcy Court has jurisdiction.

1. FRBP 7069 Satisfies The Express Pre-Emption, Field And Conflict Preemption Tests

A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity, and the Supremacy Clause can be used to enjoin enforcement of a state statute or a party seeking a court ruling that runs afoul of a federal legislative scheme. *Western Air Lines v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987), cert denied, 817 F.2d 222 (2d Cir. 1987).

Here, FRCP 69 contains language expressly pre-empting the application of any state law to the execution of a federal judgment that is not the law of the state where the federal court issuing the judgment sits. *See* FRCP 69(a). Furthermore, FRCP 69 occupies the field of execution of federal judgments in that, regardless of where property subject to a federal judgment is located, FRCP 69 compels the application to federal judgments, the state law where the federal court issuing the judgment sits and, thus, "Congress left no room for the states to supplement it." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992).

Finally, FRCP 69, on the one hand, and KL's proposed invocation of the *Edens* decision under D.C. law to void the D.C. Proceeds provision, on the other hand, creates a pre-emption conflict which "exists where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional objectives." *Pet Quarters, Inc. v.*

Depository Trust & Clearing Corp., 559 F.3d 772, 780 (8th Cir. 2009). Here, because the Representative has the right to enforce the existing Judgment and any resulting judgment entered on the Settlement Agreement, or the Settlement Agreement Order directly, a decision, if any, by the D.C. Superior Court to follow *Edens* will create a conflict of law that Mandl (and the Representative, if bound by such an order) would be unable to abide by in the face of a conflicting federal court order enforceable under New York law (via FRCP 69).

In sum, the Bankruptcy Court and the District Court erred and abused their discretion in refusing to enjoin KL, under the Supremacy Clause and pre-emption principles, from undermining the Representative's right to enforce the Settlement Agreement and execute on Mandl's property pursuant to New York law.

POINT FIVE

THE COURTS BELOW ERRED BY FAILING TO ASSERT THE INHERENT POWER OF THE COURT, THE ALL WRITS ACT AND THE ANTI-INJUNCTION ACT TO ENJOIN KL FROM ATTEMPTING TO VOID ANY PORTION OF THE SETTLEMENT AGREEMENT

i. An Order Of The D.C. Superior Court Voiding Any Provision Of The Settlement Agreement May Or May Not Bind The Representative But Will Certainly Frustrate Its Ability To Enforce The Settlement Agreement Order

The Representative moved before the Bankruptcy Court to enjoin KL from seeking to void the D.C. Proceeds provision or any other provision of the Settlement Agreement because of KL's stated intent to void much of the

Settlement Agreement in the D.C. Superior Court, as well as KL's and Mandl's stated intent to deprive the Representative from appearing and being heard in the D.C. Action on any motion to void the D.C. Proceeds provisions, repeatedly claiming that the Representative "expressly surrendered any role in the D.C. Action under the Settlement Agreement." KL's Dist. Ct. Brief at 3, 6, 11 and 23 [U.S.D.C. Docket No. 09-9675, ECF Doc. # 14].[19]

If KL succeeds in persuading the D.C. Superior Court to void the Settlement Agreement or any portion thereof, it is likely that there will be irreconcilably conflicting orders. It is possible that an order could issue from the D.C. Superior Court voiding the D.C. Proceeds provision and eliminating rights vested in the Representative (but to which litigation the Representative is not a party and will be excluded from participating by Mandl and KL). At the same time, the D.C. Superior Court may not void a provision of a federal court-ordered settlement. Accordingly, if KL is allowed to proceed in the D.C. Action to try to nullify provisions of the Settlement Agreement, and if the D.C. Superior Court rules in favor of KL on those issues, when and if Mandl obtains a judgment against KL, the Representative, if it does not receive its share of the D.C. Proceeds, will declare Mandl in default and will enforce and execute upon the Judgment and Settlement

[19] On cannot ignore the irony of KL and Mandl trying to preclude the Representative from participating in the D.C. Action (i.e. denial of due process) where KL seeks to undermine the Representative's rights, while KL, who had every opportunity to participate in the 9019 Motion or a FRCP 60 Motion before the Bankruptcy Court, refused to avail itself of a forum where all parties could be heard.

Agreement Order under FRBP 7069 and applicable New York law, setting up a conflict between a federal and state court order.

There is yet another scenario. Because of the interest the Representative obtained in the D.C. Proceeds, KL seeks to use the voiding of the Representative's rights in the D.C. Proceeds as a platform to diminish or dismiss the entire D.C. Action. Thus, KL could obtain a state court order (1) voiding the Representative's rights in the D.C. Proceeds and/or (2) voiding the entire D.C. Action, thereby setting up a conflict between the Representative's rights under the Settlement Agreement and Settlement Agreement Order and those taken away from the Representative in the D.C. Action. This scenario also deprives the Representative of its right to recover funds from a judgment to the benefit of over a thousand of Teligent's unsecured creditors who are owed in excess of $1.6 billion.[20]

Certainly, this cannot be a result that is endorsed by the Bankruptcy Code and Rules; particularly FRBP 9019, under which the Settlement Agreement Order was entered to resolve the Adversary Proceeding, and under FRBP 7069, which mandates the application of New York law to the execution and enforcement of the

[20] While KL has argued that the Settlement Agreement contemplated that Mandl could end up recovering $0 from the KL Action and, by extension, the Representative could end up receiving $0 as well, Judge Bernstein recognized that "there was nothing that [the Representative] ever said that I'm taking my chances on the validity of the assignment of proceeds provision. That's just a recognition that she could recover or Mandl would recover zero in the litigation and she'd recover fifty percent of zero." **[A37]**.

Judgment and Settlement Agreement Order, particularly given the Bankruptcy Court's duty to enforce its unambiguous orders. *Travelers*, 124 S.Ct. at 2204.

ii. The All Writs Act And The Anti-Injunction Act Confer Authority On The Court To Enjoin KL From Litigating In Another Forum The Validity Of Paragraph 3.3 Of The Settlement Agreement Or The Good-Faith And Arms' Length Bargaining Found To Justify Approval Of The Settlement Agreement Under FRBP 9019

KL has announced that it intends to ask the D.C. Superior Court to rule as invalid a fundamental provision of the Settlement Agreement that was approved by the Bankruptcy Court. The provision in question, Paragraph 3.3 of the Settlement Agreement **[A70]** provides a benefit to Teligent Inc.'s Unsecured Creditors (the "**Unsecured Creditors**") that has great value, the quantification of which remains to be determined, but that has serious potential to yield millions of dollars for the Unsecured Creditors.

The Settlement Agreement Order provides, inter alia, that "*this Court* ***having determined that the legal and factual bases set forth in the Motion*** *established just cause for the relief granted herein,*" it is ordered that the Representative "*shall have all rights and privileges set forth in the Agreement***,**" and is "a*uthorized to take all such action necessary under the Agreement* ***to effectuate the Agreement***." **[A104]** (emphasis added).

In effect, it is this Settlement Agreement Order, and the Representative's rights derived therefrom, that KL seeks to invalidate in the D.C. Action. If KL is

allowed to proceed with its strategy in the D.C. Action, and if KL achieves its objective, it will no longer be true that "the Parties to the Agreement shall have all rights and privileges set forth in the Agreement," and the Representative will be deprived of the provision of the Court's Settlement Agreement Order in which the Court mandated that "[t]he Representative is authorized to take all such action necessary under the Agreement to effectuate the Agreement." **[A84]** To the contrary, if KL is successful, Paragraph 3.3 will be ruled null and void, and the Representative's bargained for and judicially-approved opportunity to recover millions of dollars for the Unsecured Creditors will have been taken away by another court in another forum, and will put the continued viability of the entire Settlement Agreement at risk.

The Bankruptcy Court erred in concluding that it was obligated to stand by while KL tries to persuade the D.C. Superior Court to collaterally vacate the Settlement Agreement Order (thus undoing the Settlement Agreement), which the Court is duty-bound to enforce.

The Bankruptcy Court's authority to issue an injunction stems from its equitable powers under 11 U.S.C. § 105(a), *see In re Burwell*, 391 B.R. 831, 836 (8th Cir. 2008), *aff'd* 348 Fed. Appx. 198 (8th Cir. 2009) , as well as from the Anti-Injunction Act, 28 U.S.C. § 2283, *see In re U.S.H. Corp. of New York*, 280 B.R. 330, 338 (Bankr. S.D.N.Y. 2002); *In re Si Yeon Park, Ltd.*, 198 B.R. 956, 967

(Bankr. C.D. Cal. 1996); *In re Neuman*, 71 B.R. 567, 571 (S.D.N.Y. 1987), *rev'd on other grounds,* 124 B.R. 155 (S.D.N.Y. 1991), and the All Writs Act, 28 U.S.C. § 1651(a), *see Klay v. United Healthgroup, Inc*., 376 F.3d 1092, 1099, 1100 (11th Cir. 2004).

Section 105(a) of the Bankruptcy Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate *to enforce or implement court orders* or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a) (emphasis added).

The "basic purpose" of Section 105(a) "is to enable the court to do whatever is necessary to aid in its jurisdiction, *i.e*., anything arising in or relating to a bankruptcy case," including the issuance of injunctions. *U.S.H*., 280 B.R. at 339; *Si Yeon Park*, 198 B.R. at 967 (internal citation omitted); *Neuman*, 71 B.R. at 571.

The All Writs Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act authorizes a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of

jurisdiction otherwise obtained[.]" *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).

The Anti-Injunction Act, often invoked in conjunction with the All Writs Act, provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Section 105(a) of the Bankruptcy Code constitutes the necessary "express authorization" for a Bankruptcy Court to issue an order enjoining state court proceedings under the Anti-Injunction Act. *See U.S.H.*, 280 B.R. at 338-39; *Si Yeon Park*, 198 B.R. at 966-67; *Neuman*, 71 B.R. at 571-72.

The Bankruptcy Court entered the Settlement Agreement Order approving all terms of the Settlement Agreement and creating an enforceable contract under New York law and applicable bankruptcy law. Where a Court has entered an order reflecting a choice of law provision, a party or bound non-party may not seek application of a different state's laws in a state court. *See Olin Corporation v. Ins. Co of North America*, 807 F. Supp. 1143, 1153 (S.D.N.Y. 1992). Moreover, where a party asserts claims in a state court action to defeat a federal court order, an injunction may be issued to enjoin the party from proceeding in the state court action. *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 248-9 (2d Cir. 1961).

While the Representative contends that the Bankruptcy Court actually adjudicated all issues raised in the Settlement Agreement and expressly authorized the Representative's right to enforce all terms therein, the relitigation exception "may apply even if the merits of the case were never reached, provided that a critical issue concerning the case has been adjudicated properly." *Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1015 (8th Cir. 2002) ("The legislative policy that 'permits a federal court to enjoin state court action when a federal court has decided a suit on its substantive merits has equal force *when a critical underlying issue unrelated to the substantive merits of the action has been litigated to finality*."(emphasis added)); *accord, Smith v. Woosley,* 399 F.3d 428, 436 (2d Cir. 2005).

It is critical to note that the Court's injunctive power under the All Writs Act is not limited to parties to the original action, but rather "extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice . . . and encompasses even those who have not taken any affirmative action to hinder justice.'" *New York Tel. Co.*, 434 U.S. at 174 (internal citations omitted). *See United States v. District Council of New York City*, 592 F. Supp. 2d 708, 716-17 (S.D.N.Y. 2009); *Se. Penn. Transp.*

Auth. v. Penn. Pub. Util. Comm., 210 F. Supp. 2d 689, 714 (E.D. Pa. 2002), *aff'd,* 342 F.3d 242 (3d Cir. 2003).

Similarly here, irrespective of whether or not KL was a "party" to the Settlement Agreement or the Adversary Proceeding, the Bankruptcy Court had the authority under the All Writs Act and the Anti-Injunction Act, and under Section 105(a), to enjoin KL from acting in a manner that would undermine the authority of the Bankruptcy Court and nullify, in material respects, its Settlement Agreement Order.

In the Bankruptcy Decision, the Bankruptcy Court determined that it could not enforce the Settlement Agreement Order under 11 U.S.C. § 105 because "an exercise of Section 105 power [must] be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective." **[SPA 24]**

Now that KL has disclosed that it intends to seek relief in the D.C. Action pursuant to the *Edens* decision, decided after entry of the Bankruptcy Decision, the gauntlet has been thrown down by KL, creating a conflict of laws between the Representative's right to enforce the Judgment and Settlement Agreement Order under New York law pursuant to FRCP 69 and FRBP 7069, and placing at risk other provisions of the Settlement Agreement approved by the Bankruptcy Court as being entered in "good faith" and through "arms-length" bargaining pursuant to

FRBP 9019, by alleging in the D.C. Superior Court that Mandl and the Representative colluded or engaged in misconduct.

Bankruptcy courts are "courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process." *In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1136 (2d Cir. 1994). Section 105(a) of the Bankruptcy Code grants bankruptcy courts the "equitable power to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 92 (2d Cir. 2003) (quoting 11 U.S.C. § 105(a)), and allows Bankruptcy Courts to utilize their equitable powers if "exercised within the confines of the Bankruptcy Code." *Dairy Mart*, 351 F.3d at 92.

The Bankruptcy Court incorrectly construed the *Dairy Mart* case as requiring the Representative to "[specify a] bankruptcy Code provision that § 105(a) is needed to implement." **[SPA 24]**.

The Representative did not ask the Bankruptcy Court to utilize its equitable powers to exceed or go beyond the boundaries of the Bankruptcy Rules and Code (which was the concern of the *Dairy Mart* Court), but merely asked the Bankruptcy Court to enforce the Settlement Agreement Order and the rights conferred thereunder to the Representative pursuant to FRBP 9019. While the

Bankruptcy Court determined there were no Bankruptcy Rules or Code sections upon which to act under Section 105, it disregarded the inevitable conflict between a D.C. Superior Court order voiding the Representative's rights in the Settlement Agreement which the Representative obtained under FRBP 9019 via the entry of the Settlement Agreement Order. Additionally, now that KL has declared its intention to attempt to void the D.C. Proceeds provision of the Settlement Agreement under recent D.C. federal case law (i.e. *Edens*), this conflicts with the Representative's right to enforce the Judgment and Settlement Agreement Order under New York law (which, under Article 52 of the CPLR, allows enforcement against all property that can be assigned under New York law (including the D.C. Proceeds)), consistent with and as mandated by FRBP 7069.

Furthermore, the Bankruptcy Court denied application of the Anti-Injunction Act and All Writs Act on the ground that these acts "cannot be evaded indirectly by seeking to enjoin the litigants rather than the state court (citation omitted). Any doubts should be resolved in favor of not issuing an injunction against state court proceedings." **[SPA 23-24]** Finally, the Bankruptcy Court determined that an injunction is unnecessary to aid the Court's jurisdiction and effectuate its order, saying the D.C. Action "does not affect the validity of the Settlement Order, or anything that the Court decided." **[A24-25]**

The Bankruptcy Court's bases for denying issuance of an injunction under the All Writs Act and for concluding that an injunction is unnecessary to aid in the Court's jurisdiction and effectuate its order are erroneous. First, there is no attempt by the Representative to indirectly enjoin a state *court* (i.e. the D.C. Superior Court) from acting. Rather, the Representative seeks to enjoin *KL* from filing and pursuing a motion that would ask the D.C. Superior Court to issue an order that would collaterally attack the benefits derived by the Representative (and, by extension, Teligent's creditors) from the Settlement Agreement Order, and the right to enforce the Settlement Agreement Order in its totality, and pursuant to FRBP 9019 and FRBP 7069 to maximize recovery of assets for Teligent's unsecured creditors.

Second, while the Bankruptcy Court ruled that any litigation regarding the D.C. Proceeds provision does not affect the validity of the Settlement Agreement Order, or anything the Court decided, this was an erroneous legal conclusion. The validity of the Settlement Agreement and Settlement Agreement Order is directly affected, as the Representative's right to enforce the Order pursuant to FRBP 9019 and 7069 would be undermined by a ruling voiding the Representative's right to enforce its right against the D.C. Proceeds pursuant to New York law made applicable by FRBP 7069. Further, any attempt to undermine the legal force or effectiveness of the D.C. Proceeds provision is a slippery slope, as KL also seeks

to void other provisions of the Settlement Agreement (and, thus, the Settlement Agreement Order) (i.e., the so-called "gross-up" recital, by alleging collusion and other misconduct) even in the face of the Bankruptcy Court's implicit and necessary finding under FRBP 9019 that the Settlement Agreement was negotiated in good faith and at arms' length. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988).

CONCLUSION

The Bankruptcy Court applied erroneous legal standards in reaching its conclusion that it could not enjoin KL. As a result, the Bankruptcy Court erroneously refused to issue such an injunction. The District Court likewise erred in refusing to reverse the Order of the Bankruptcy Court. The Order of the Bankruptcy Court denying the Cross-Motion, and the Order of the District Court affirming the Order of the Bankruptcy Court, should be reversed.

Dated: Croton on Hudson, New York
August 19, 2010

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (as modified by an order of this Court entered July 9, 2010, Docket No. 10-2257, ECF Doc# 55) because this brief contains 18668 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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