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Hearing Date: June 23, 2011 @10:00 am
Objections Due: June 13, 2011 @4:00 pm

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In re	**Chapter 11**
TELIGENT SERVICES, INC. et.al.	**Case No. 01-12974 (SMB)** **Substantively Consolidated**

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SAVAGE & ASSOCIATES, P.C. as the Unsecured Claims Estate Representative for and on behalf of TELIGENT, INC., et.al.,	**Adv. Pro. No. 03-02523**

Plaintiff,

-against-

ALEX MANDL,

Defendant

-against-

K&L Gates,

Party-in-Interest

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SAVAGE & ASSOCIATES, P.C.'S MOTION TO (I) CLARIFY AND ENFORCE COURT-ORDERED SETTLEMENT AGREEMENT AND FOR DECLARATORY JUDGMENT AND (II) TO (A) ENJOIN K&L GATES AND ALEX MANDL FROM VIOLATING THE MEDIATION ORDERS AND (B) STAY AND ENJOIN, PURSUANT TO 11 U.S.C. § 362 AND 28 U.S.C. §§ 1651 AND 2283, K&L GATES FROM EXERCISING CONTROL OR IMPAIRING PROPERTY OF TELIGENT'S ESTATE UNDER 11 U.S.C. § 541(a)

Savage & Associates, P.C. (the "**Representative**"), as and for the Unsecured Claims Estate Representative of Teligent, Inc. (**"Teligent**"), files this Motion seeking entry of an order (1) Clarifying and Enforcing the court-ordered Settlement Agreement, executed by and among the Representative, Alex Mandl ("**Mandl**")(the defendant in the above captioned adversary proceeding (the "**Adversary Proceeding**")), Susan Mandl ("**Mrs. Mandl,**" together with Mandl,

the "**Mandls**") and ASM Investments, Inc. ("**ASM**"), for a Declaratory Judgment, and (2) enjoining K&L Gates ("**KL,**" together with Mandl and the Representative, the "**Parties**") from impairing property of Teligent's estate under 11 U.S.C. § 362 and 28 U.S.C. §§ 1651 and 2283 (collectively, the "**Motion**") and seeking relief in the DC Court (defined below) to obtain Mediation Communications, and respectfully sets forth and represents:

I. Nature of the Case and Course of Proceedings

a. Nature of the Case

This Motion is occasioned by the so-ordered decision (the "**Decision**"), *Savage & Associates P.C. v. Mandl (In re Teligent)*, 417 B.R. 197 (Bankr.S.D.N.Y.2009), *aff'd K&L Gates v. Savage & Associates PC (In re Teligent)*, 2010 U.S. Dist. LEXIS 49010 (S.D.N.Y. May 13, 2010), *aff'd Savage & Associates PC v. K&L Gates (In re Teligent)*, 2011 U.S. App LEXIS 9451 (2d Cir. May 5, 2011), *rendered* in this Adversary Proceeding by this Court denying, *inter alia*, KL's motion (the "**Mediation Motion**") to modify the order of this Court directing and governing mediation in the Adversary Proceeding (the "**Mediation Order**") and General Order M-143 of the United States Bankruptcy Court, Southern District of New York, dated January 17, 1995, as amended and restated by General Order M-390, dated December 1, 2009[1](the "**General Mediation Order,**" together with the Mediation Order and the Decision, the "**Mediation Orders**")), and the Representative's Cross-Motion ("**Cross-Motion**") seeking an order enjoining KL from collaterally attacking, in the D.C. Superior Court, the Bankruptcy Court Order (the "**Settlement Agreement Order,**" annexed hereto and made a part hereof as **Exhibit A**) approving a settlement agreement of the Adversary Proceeding (the "**Settlement Agreement,**" annexed hereto and made a part hereof as **Exhibit B**).

Per the terms of the Settlement Agreement, (a) Mandl was compelled to, and indeed, commenced, in the D.C. Superior Court (the "**DC Court**") via the filing of a Complaint (the "**Complaint,**" annexed hereto and made a part hereof as **Exhibit C**), a professional liability

[1] References herein to the General Mediation Order shall be to General Order M-143.

action against KL (the "**D.C. Action**"), his former counsel in the Adversary Proceeding, and (b) Mandl is obligated to remit to the Representative 50% of all proceeds in the D.C. Action, net of Mandl's attorneys' fees and expenses (the **"D.C. Proceeds**").

Upon filing its answer (the "**Answer,**" annexed hereto and made a part hereof as **Exhibit D**) 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 (and the DC Action, itself), 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 ..." **Exhibit D at 13.**

In order to substantiate certain affirmative defenses in the DC Action, KL purported to need communications made during the mediation process (collectively, the "**Mediation Communications**"), to which the Representative asserted a mediation privilege, occasioning the filing of KL's Mediation Motion with this Court.

Upon learning of KL's intent to seek to void the D.C. Proceeds provision in the D.C. Action, the Representative filed the Cross-Motion in the Bankruptcy Court alleging that KL, having received notice of a motion filed under Federal Rule of Bankruptcy Procedure ("**FRBP**") 9019 (the "**9019 Motion**") to approve the Settlement Agreement, 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, in its Decision, denied both the Mediation Motion and the Cross-Motion determining, among other things, that with respect to (1) the Mediation Motion, KL failed to carry its burden of proof to justify modification of the Mediation Order and the General Mediation Order and allow blanket production of Mediation Communications made during the "mediation process," Decision, 417 B.R. at 209, and (2) the Cross-Motion, the Court held, *inter alia*, that the approval of the Settlement Agreement under the standard and criteria set forth under FRBP 9019 (i) it never decided the issue of whether the remittance by Mandl of the DC Proceeds to the Representative was permissible under applicable state law and (ii) because (a) FRBP 9019

did not required the court to "determine the enforceability of a cause of action assigned by (sic) settling party to (sic) trustee in order to approve the settlement," but only required that this Court determine that the settlement does "not fall below the lowest point of reasonableness," *ipso facto* (b) KL did not have standing to appear and be heard on the 9019 Motion. Decision, 417 B.R. at 211-213.

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, *K&L Gates***,** 2010 U.S. Dist. LEXIS 49010**.** Savage and KL each filed a notice of appeal from the District Court Decision. On May 5, 2011, the Second Circuit Court of Appeals rendered a decision affirming the Decision, *Savage & Associates*, 2011 U.S. App LEXIS 9451 (the "**Second Circuit Decision**")**.**

Since the entry of the Second Circuit Decision affirming this Court's Decision, the Representative has been notified by Mandl's counsel that KL intends to seek blanket production of mediation communications in the DC Action and, in addition to this blatant violation of this Court's order, seeks to preclude the Representative from participating in these proceedings in the DC Court.

Because of KL's anticipated and admitted actions in the DC Court in connection with the Mediation Communications, the Representative seeks an order of this Court enjoining KL from seeking production of any Mediation Communications and compelling KL to seek relief in this Court in connection with any requests that impact or entail interpretation or enforcement of the Mediation Orders.

Further, inasmuch as this Court held in the Decision that it never ruled on the DC Proceeds provision of the Settlement Agreement, the Representative <u>now</u> seeks a ruling from this Court that (i) New York law is applicable to the DC Proceeds provision and the Representative's and Mandl's rights thereunder pursuant to the express terms of the Settlement Agreement (ii) regardless of which state law applies, the DC Proceeds constitute property of Teligent's estate

over which this Court has exclusive jurisdiction and such proceeds may be transferred to the Representative, and (iii) inasmuch as the DC Proceeds constitute property of Teligent's estate, KL may not seek relief in the DC Court to adversely impact the Representative's right in the DC Proceeds and, thus, must be enjoined.

b. Course of the Proceedings

i. The Adversary Proceeding

On May 21, 2001, Teligent and its domestic subsidiaries, filed for protection under Chapter 11 of Title 11 of the U.S. Code.

In September 2002, the Representative was appointed the Unsecured Claims Estate Representative of 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 exclusive right to commence, on behalf of Teligent, adversary proceedings arising under Chapter 5 of Title 11 of the U.S. Code.

In April 2003, the Representative commenced numerous adversary proceedings (the "**Adversary Proceedings**") in the United States Bankruptcy Court for the Southern District of New York 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.

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 May 2001 Chapter 11 filing, thus contractually mandating the repayment of a $12 million loan (plus accrued interest) that Mandl had received from Teligent in 1996. 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)

After a trial took place before this Court (at which Mandl was represented by KL), 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.

ii. The Mediation and Settlement

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 (the "**New Trial Motion**") [U.S.B.Ct., Docket No. 03-2523. EDF Doc. # 201**]** and the Representative filed a motion for reconsideration of the court's post-trial decision seeking interest on the Judgment (the "**Reconsideration Motion**").

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

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 and Mandl decided to resume the court-ordered mediation ("**Mediation**") of the Adversary Proceeding. Prior to the commencement of Mediation, 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. As such, Mandl's new counsel, GT, invited KL to participate in Mediation to try to achieve a global resolution of claims. KL declined to participate in Mediation, but was, thus, aware of the malpractice claim Mandl intended to assert against it.

Mediation negotiations commenced on March 25, 2008 and continued through the execution of the Settlement Agreement drafted by GT (for Mandl) and the Appellant**,** and the

filing of the 9019 Motion and the Mediator's Report on June 6, 2008, seeking Bankruptcy Court approval of the Settlement Agreement. The Mediation was comprised of at least five (5) days of meetings with the Representative, Mandl and their respective counsel present in New York City and a one (1) day meeting in Washington, DC with the Representative and Mandls' counsel, alone. The Mandl's executed the Settlement Agreement in Maryland on May 29, 2008 and the Representative executed the Settlement Agreement in New York on May 30, 2008.

On May 20, 2008 (prior to the filing of the 9019 Motion), Mandl filed his Complaint in the D.C. Superior Court instituting the D.C. Action against KL. The Complaint seeks, *inter alia*, a judgment against KL arising from KL's malpractice in connection with its representation of Mandl in the Adversary Proceeding and, in particular, KL's failure to depose a single witness during discovery or call a single witnesses at trial (other than Mandl) to substantiate Mandl's claim that he was terminated for other than cause by Teligent. See Complaint at Exhibit C.

Under the Settlement Agreement, Mandl is to pay $6.005 million in cash to the Representative. 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 Investments (**ASM**").

iii. The DC Action and DC Proceeds

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

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." **Settlement Agreement at 15.**

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." **Settlement Agreement at 18.**

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." **Settlement Agreement at 24-25.**

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." **Settlement Agreement at 25.**

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." **Settlement Agreement at 25.**

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." **Settlement Agreement at 26.**

On June 6, 2008, the 9019 Motion was filed with the Bankruptcy Court in New York (Docket No. 03-2523, Doc. No. 220). 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*." **Settlement Agreement Order at 1-2** (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)" **Exhibit D**, Answer at 13.

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. **Settlement Agreement at 5, 17, 22.**

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].

During the pendency of the Cross-Motion in the Bankruptcy Court, KL refused to disclose which state law it believed was applicable to the DC Proceeds transfer. However, after the entry of the Decision, and while the Decision was pending on appeal before the Southern District of New York, a decision was rendered in the DC District Court, *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75 (D.D.C. 2009), in which decision the DC district court determined that under DC law a company may not assign its legal malpractice claim to a former litigation adversary as a part of the settlement of that litigation because it violated public policy, and which decision, KL, in its brief filed on appeal with the Southern District of New York, now 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.

iv. The Mediation Motion, Cross-Motion and Current Developments

Since the Second Circuit rendered the Second Circuit Decision, KL filed a status report (annexed hereto as **Exhibit E**) with the DC Superior Court disclosing that it would schedule a "meet and confer" with Mandl's counsel regarding outstanding discovery issues. Thereafter, the Representative's DC Action counsel, Jacques Semmelman, Esq., was contacted by Mandl's counsel and notified that KL intended to seek production of the following documents from Mandl, consensually, or from the DC Court, in the alternative:

1) documents exchanged during the mediation itself
2) documents exchanged after the actual mediation but before settlement, which were cc'd to the mediator
3) communications between Greenberg Traurig and Denise (not cc'd to the mediator)
4) communications between Greenberg Traurig and the Mandls (some of which might make reference to things the Representative said)

Mandl's counsel notified KL's counsel that it believed that the Representative needed to be included in all such conversations. KL's counsel claimed it would refuse to speak with Mandl's counsel if the Representative participated. With obvious intent to comply with this Court's Mediation Order and the order entered on the Decision, Mandl's counsel, in the face of KL's objection, nonetheless asked the Representative to participate in any such "meet and confer." *See Letter from Andy Hall, Esq. to Denise Savage, Esq, dated May 20, 2011*, annexed hereto and made a part hereof as **Exhibit F** (the "**Hall Letter**").

In the Hall Letter, Mr. Hall states that,

> Immediately following the rendition of the opinion by the Second Circuit, K&L Gates announced its intent to seek an order from the District of Columbia Superior Court requiring the production of wide varieties of information that fall within areas you have asserted are privileged and not subject to production. We are not in a position to enforce any rights that you have and will not do so before the D.C. Superior Court. []
>
> **********
>
> As we advised Mr. Semmelman, K&L Gates is asserting that you have no right to participate with regard to their motion to compel the mediation documents before the D.C. Court or to participate in the meet and confer sessions. We have advised K&L Gates that we disagree,…

****

> We will not work with you in any way on this subject. We think that your positions are hostile and adverse to us and we will not facilitate them. Mandl stands ready to produce all documents and is not opposing the production of documents sought by K&L Gates.

Hall Letter at 1-2.

Annexed to the Hall Letter was a letter from Michael Sundermeyer, Esq. to Andy Hall, Esq., dated May 19, 2010 (the "**WC Letter**", annexed hereto and made a part hereof as **Exhibit F**) in which Mr. Sundermeyer tells Mr. Hall,

> It remains K&L's position that the Teligent, Inc.'s Unsecured Claims Estate Representative—Savage & Associates, P.C., represented by Denise L. Savage, Esq.—has no appropriate role with regard to this meet-and-confer session. Participation by the Representative in the meet-and-confer session will constitute another breach of the collusive Representative-Mandl Settlement Agreement.

WC Letter at 1.

The meet-and-confer session (the "**MC Session**") referenced in the WC Letter took place on May 26, 2011. The Representative, Mandl's counsel and KL's counsel participated in the MC Session conference call and KL's counsel had a court reporter present during the MC Session. A copy of the transcript of the MC Session is annexed hereto and made a part hereof as **Exhibit G** (the "**Session Transcript**").

As reflected in the Session Transcript (pp. 26-27), KL intends to file a Motion to Compel production of the following categories of Mediation Communications:

> **(1)** Mediation Communications prepared leading up to and/or for use in the mediation meetings
>
> **(2)** Mediation Communications created post-in-person mediation and/or where the Mediator was copied
>
> **(3)** Mediation Communications between the Representative and any other person relating to the mediation proceedings but not documents created during the in-person mediation sessions.

(4) Mediation Communications between Mandl and GT concerning any mediation process.

(5) Any and all Mediation Communications between Mrs. Mandl and ASM and any person relating to the mediation process

(6) All Mediation Communications up to April 28, 2008, the date on which KL was relieved as counsel by an order of this Court.

Session Transcript at 6 *et seq.*

As this Court knows, the Representative asserted, and KL acknowledged in its reply (Docket No. 03-2523, Doc. No. 235 at 28) to the Representative's objection filed to the Mediation Motion and at the hearing on the Mediation Motion (Mediation Motion Hearing Transcript at 11, lns 17-25), that the "mediation process" spanned from the time Mandl and the Representative contacted the Mediator in March 2008 through to June 6, 2008, the date the Mediator's Report was filed with this Court pursuant to the express terms of the General Mediation Order.

While KL asserted in the Mediation Motion that all Mediation Communications should be produced without regard to any conferences or otherwise, this Court clearly disregarded this argument and determined that the "mediation process" encompassed communications regarding the Mediation commencing by and among the Mediator, Mandl and the Representative in March 2008 and terminating with the filing of the Mediator's Report on June 6, 2008. If it did not, the Court would have permitted production of documents for some portion of the period from March 2008 through June 6, 2008, which it did not.

Nonetheless, as set forth in the Session Transcript (pp. 10-13), KL intends to seek a ruling from the DC Court that, pursuant to this Court's Mediation Orders and applicable federal laws, the mediation period, at most, only encompasses the March 25-26th, 2008 meetings, and, at the least, encompasses none of the period alleged by the Representative because KL believes it

can demonstrate a compelling need for the voluminous and all encompassing documents that it intends to seek.

Further, KL intends to ask the DC Court to preclude the Representative from appearing and being heard on its anticipated Motion to Compel claiming that this Court expressly authorized KL to seek such relief via the Motion to Compel in the DC Court and that this Court never stated that the Representative should have the right to appear in connection therewith. **Session Transcript at 25**.

Finally, KL has stated that it will not even serve the Representative with the Motion to Compel (though Mandl's counsel has represented that it will forward the document to the Representative, presumably immediately upon its filing by KL). **Session Transcript at 70**.

In addition to KL's admitted intentions and strategy, Mandl's counsel has declared that if the DC Court directs the production of any of the above categories of documents sought by KL, Mandl's counsel will produce the documents, even in the event the Representative is precluded by the DC Court from appearing and being heard in the DC Action and even were such an order to be in conflict with this Court's Mediation Orders. **Session Transcript at 28, 33-37**.

Based upon the foregoing, the Representative seeks the below relief from this Court.

RELIEF SOUGHT

II. KL Should be Enjoined from Seeking to Modify the Mediation Order in the DC Court and Mandl should be Enjoined from consenting to the production of any Mediation communications

a. KL and Mandl Should be Enjoined

As set forth in the Hall Letter and WC Letter, KL intends to file a motion in the DC Court to compel Mandl to produce Mediation Communications which this Court, the District Court and the Second Circuit have all ruled are confidential and protected by the Mediation Orders entered by this Court. Further, Mandl intends to consent to any motion to compel filed by KL in the DC Action and, thus, if the Motion is granted by the DC Court, Mandl could conceivably produce documents in violation of this Court's Mediation Orders.

As such, the Representative seeks a permanent injunction from this Court against KL in which KL is (i) enjoined from filing any motion in the DC Court that seeks any communications between Mandl, the Representative, their respective counsel and the Mediator, relating to or in connection with the Mediation of the Settlement Agreement for the period commencing March 1, 2008 through June 6, 2008 (the "**Mediation Period**"), (ii) compelled to file any motions in which KL seeks a "specific" mediation communication with this Court only, and only this Court, to ensure (a) that this Court may interpret and enforce its own order, (b) that this Court's Mediation Orders are consistently applied and applied pursuant to the Decision and the Second Circuit's affirmance thereof and (c) that the Representative is afforded the right to be heard on this any such motion by KL and not precluded from such a motion in the DC Action, and (iii) Mandl is enjoined from producing any Mediation Communications without further order of this Court.

b. This Court Prohibited Production of Mediation Communications and Delineated the Mediation Period

As set forth in the Decision, as affirmed, this Court prohibited the blanket production of Mediation Communications (Decision, 417 B.R. at 209) and delineated the Mediation Period as commencing March 2008 and terminating with the filing of the Mediator's Report on June 6, 2008. Decision, 417 B.R. at 209. Such a ruling is consistent with applicable rules governing mediation and court decisions, as set forth in the Representative's objection filed to the Mediation Motion and, again, set forth below. At this time we ask the Court to reinforce this finding consistent with applicable orders, rules and case law.

The General Mediation Order expressly provides that confidentiality encompasses all communications in the entire mediation process, not just a "mediation session." S.D.N.Y. Civ. R. 83.12. The Rules for the Southern District provide as follows:

(j) Mediation Sessions and Location

* * *

> (3) *The mediation will conclude when the parties reach a resolution of some or all issues in the case or when the mediator concludes that resolution (or further resolution) is impossible*. (emphasis added).

S.D.N.Y. Civ. R. 83.12.

In fact, L.R. 83.12 makes a distinction between "mediation sessions" and the mediation process when discussing confidentiality. S.D.N.Y. Civ. R. 83.12(l) which provides,

> *Confidentiality*
>
> (1) The entire *mediation process* shall be confidential. The parties and the mediator shall not disclose information regarding the process, including settlement terms, to the assigned Judge or to third persons unless all parties agree or the assigned Judge orders in connection with a judicial settlement conference.[]

S.D.N.Y. Civ.R. 83.12(l) (emphasis added).

Likewise, the Alternative Dispute Resolution Act of 1998 ("ADRA"), 28 U.S.C. § 651 ("ADRA"), requires that all "dispute resolution communications" remain confidential and undisclosed by the mediation participants. 5 U.S.C. §574(b). A "dispute resolution communication" under ADRA is defined as "any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication." 5 U.S.C. §571(5). Nothing in this definition limits confidentiality only to communications made during a mediation session.

Section 5.0 of the General Mediation Order provides in relevant part:

> 5.0 Confidentiality.
>
> 5.1 Confidentiality as to the Court and Third Parties. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the court or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and shall not be provided to the court, unless they would be otherwise admissible. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the court in connection with the referred matter. Nothing in this section, however, precludes

> the mediator from reporting the status (though not content) of the mediation effort to the court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.
>
> 5.2 Confidentiality of Mediation Effort. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this court in connection with the referred matter, any aspect of the mediation effort, including, but not limited to:
>
> > A. Views expressed or suggestions made by any party with respect to a possible settlement of the dispute;
> > B. Admissions made by the other party in the course of the mediation proceedings;
> > C. Proposals made or views expressed by the mediator.

General Mediation Order at §§ 5.1 and 5.2 (emphasis supplied). While Section 5.1 and 5.2 contemplate confidentiality for the "mediation process," Section 3.1 of the General Mediation Order refers only to scheduling a "mediation conference." Section 3.4 of the General Mediation Order provides that the Mediator shall file a report with the Court at the conclusion of the Mediation.

Finally, and most importantly, Section 3.5 of the General Mediation Order then provides that,

> 3.5 Termination of Mediation. Upon receipt of the mediator's final report, the mediation will be deemed terminated, and the mediator excused and relieved from further responsibilities in the matter without further court order.

Based upon the foregoing, if the General Mediation Order had meant to apply confidentiality only to "mediation sessions," Section 5 governing confidentiality would have referenced "sessions." Instead, Section 5 confidentiality covers the "mediation process" and "mediation proceedings."

Finally, Section 3.5 expressly provides that the mediation terminates **only** up on the filing of the Mediator's Report.

The Mediator's Report, executed by the Mediator, Erwin Katz, on May 29, 2008, was not filed with the Court until June 6, 2008 (Docket No. 03-2523, Doc. No. 220, Exhibit 1, Exhibit B).

Accordingly, by the express terms of the General Mediation Order, the "mediation process" or "mediation proceedings" are not deemed terminated until June 6, 2008, the date the Mediator's Report was filed with the Court. General Mediation Order, §§ 3.4 and 3.5.

Consistent with this Court's General Mediation Order and Decision, Courts have held that the duration of a mediation for purposes of maintaining mediation confidentiality "is not limited to the mediation conference":

> Client and Current Counsel claim that these disclosures did not violate [Local] Rule 33 because they involved conversations that occurred after the Mediation concluded. Although Rule 33 does not specifically define the duration of "mediation" for purposes of maintaining confidentiality, it is plain that the "mediation" is not limited to the mediation conference, but continues until the mediated dispute has been either dismissed or is otherwise removed from the OCM.

In re Anonymous, 283 F.3d 627, 635 (4th Cir.2002).

Based upon the *Anonymous* decision and the express terms of the General Mediation Order, the Mediation commenced on March 1, 2008, when the Mediator was first contacted by the parties, and did not terminate until the filing of the Mediator's Report on June 6, 2008. Thus, the "mediation process" contemplated under Section 5.1 of the General Mediation Order must, *ipso facto,* encompass the period March 25, 2008 through June 6, 2008. As this Court's Decision directed that KL may only seek "a specific communication not covered by the confidentiality provisions of the Mediation Orders (e.g. it was not made "during the mediation process")," Decision, 417 B.R. 209, consistent with the provisions of the General Mediation Order of this Court, this Court ruled, *ipso facto*, that KL may not seek communications for the period March 1, 2008 through June 6, 2008.[2]

c. This Court's Decision, affirmed by the Second Circuit, declared blanket demands for Mediation Communications made during the Mediation Process are prohibited

In its Decision, this Court ruled that K&L failed to carry its burden of proof to justify blanket relief from confidentiality provisions of the Mediation Order and that such confidentiality

[2] If the Court concludes that it did not address this issue in the Decision, the Representative moves this Court to address this issue in conjunction with this Motion.

provisions governed the entire mediation process. Decision, 417 B.R. at 209. Accordingly, principles of *res judicata* and *collateral estoppel* prohibit KL from seeking what amounts to blanket production of mediation communications in the DC Action. See applicable case law in Point III(g) below.

d. Application for "Specific" Mediation Communications, to the extent sought by KL or produced by Mandl, must be made to and approved by this Court and KL should be enjoined from seeking relief in any other court

Once a federal court enters an order, it retains exclusive jurisdiction over matters related to, and interpretation of, the judgment. In *United States* v. *Am. Soc'y of Composers (In re Karmen),* 32 F.3d 727 (2d Cir. 1994), the Second Circuit held that the Southern District of New York retained exclusive jurisdiction over matters related to a judgment, and that retaining jurisdiction was a proper exercise of its authority so that it could "protect or effectuate its judgments." *Id.* at 731 (citing 28 U.S.C. § 2283). The Second Circuit noted that:

> As we determined over 20 years ago, a federal district court has exclusive jurisdiction over actions that, if left to the state courts to decide, would frustrate the federal court's continuing jurisdiction over and implementation of the consent judgment between [the parties] and the government.

ld (citing *United States* v. *ASCAP,* 442 F.2d 601, 603 (2d Cir.1971)); *see also United States* v. *City of New York,* 972 F.2d 464, 469 (2d Cir.1992) (affirming removal of state law actions to federal court, where issues raised in state court could not be separated from the relief ordered in a consent decree).

The Bankruptcy Court has exclusive jurisdiction to interpret and enforce its own orders. *Am. Booksellers Assoc. v. Houghton Mifflin*, No. 94-CV-8566 (JFK), 1998 U.S. Dist. LEXIS 4341, at *8-9 (S.D.N.Y Apr. 2, 1998). Courts bar litigation by non-parties in other forums in which nonparties seek interpretation of previously entered court decrees. *See United States v. Int'l Bhd. of Teamsters*, 907 F.2d 277, 280-81 (2d Cir. 1990).

In *American Booksellers Ass'n v. Houghton Mifflin Co*., 1998 U.S. Dist. LEXIS 4341 (S.D.N.Y. 1998) the New York District Court ruled that the New Jersey court must retain

enforcement power over its own confidentiality orders if it is to ensure the progress of its own caseload and maintain jurisdiction over the matters before it. *See American Booksellers Ass'n v. Houghton Mifflin Co.*, 1998 U.S. Dist. LEXIS 4341 (S.D.N.Y. 1998), at *3 ("If there was no exclusive jurisdiction, the Orders would be subject to inconsistent interpretations all over the country . . . ."); *In accord CSI Inv. Partners II, L.P. v. Cendant Corp*, 2006 U.S. Dist. LEXIS 11014, *5 (SDNY 2006).

Clearly, KL and Mandl seek to subvert the express terms and spirit of the Mediation Orders and the Second Circuit Decision, by seeking an effective blanket production of Mediation Communications, or the filing of a potential motion to compel production of documents from Mandl seeking "specific" Mediation Communications, both of which actions require an interpretation of this Court's Mediation Order, and which such motion KL will seek to prohibit/exclude the Representative's participation in any such proceeding in the DC Action (leaving no party to defend the Representative's rights under the Mediation Order). As the anticipated and admitted abuses and disregard of this Court's order by KL and/or Mandl are legion, this cannot be countenanced and this Court must retain exclusive jurisdiction over KL's demand for any Mediation Communications.

e. This Court must enjoin KL to Effectuate its Judgment

As such, pursuant to 28 U.S.C. §§ 1651 and 2283, the Representative seeks a permanent injunction enjoining KL from seeking, *from the DC Court or any other Court but this Court*, relief in connection with any Mediation Communications. Further, the Representative seeks a permanent injunction against Mandl enjoining him from voluntarily or involuntarily producing any document to KL unless pursuant to a further order of this Court.

28 U.S.C. §2283, the so-called Anti-Injunction 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.

"It is well settled that the Act applies to injunctions that prohibit a person from litigating in a state court, as well as injunctions that directly stay proceedings in a state court." *Smith v. Woosley*, 399 F.3d 428, 431 (2d Cir. 2005)(citing *Atl. Coast Line RR Co. v. Bhd. Of Locomotive Eng'rs,* 398 U.S. 281, 287, 90 S.Ct. 1739, 26 L.Ed.2d 2134 (1970)).

An injunction may be entered by a Court against state-court proceedings when necessary to protect or effectuate a federal court judgment. *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245 (2d Cir. 1961). In discussing the subject order in the *Sperry* decision, the Second Circuit said,

> It was this aspect of the order that the plaintiff was trying to nullify by proceeding in the state court instead of seeking similar relief in the federal court action. Enjoining this attempt to avoid the thrust of the federal court decree is not prohibited by 28 U.S.C. §2283 [citations omitted].

Sperry, 288 F.2d at 249.

Likewise, KL is seeking to nullify this Court's so-ordered Decision, the Mediation Order and the General Mediation Order of this Court by admitting its intent to file a motion to compel production of blanket requests of Mediation Communications which Mandl's counsel declares, and the Representative agrees, fall into to categories objected to by the Representative and the production of which have been previously denied by this Court. *See* Exhibit F, Hall Letter and WC Letter. This is even more problematic in light of the fact that the Representative is not a party in the DC Action and KL has tried to engage in its quest to obtain Mediation Communications without informing the Representative and has declared its intent to preclude the Representative from participating in any motion relating to any matter in the Court, including any motion to compel Mandl to produce documents that encompass Mediation Communications. *See* Exhibit F, WC Letter and Hall Letter; Session Transcript at 25, 70

A federal court has the power under the Anti-Injunction Act to "issue an injunction 'to protect its judgments' from further litigation in state courts under the 'relitigation exception' to the broad prohibition of the Anti-Injunction Act." *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas*, 500 F.3d 111, 123 n.15 (2d Cir. 2007)(citing *Chick Kam Choo*

v. Exxon Corp., 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988)) *cert den.*, *mot.granted* 554 U.S. 929, 128 S.Ct 2958, 171 L. Ed 2d 906 (2008). "The relitigation exception authorizes an injunction to protect against relitigation of 'claims or issues' that 'actually have been decided by the federal court.'" *Chick Kam Choo*, 486 U.S. at 148.

"[T]he relitigation exception permits a preemptive strike that avoids the need to assert prior adjudication defenses in a state court when faced with claims that have already been rejected in a federal court." *Smith*, 399 F.3d at 434.

Here, this Court ruled in the so-ordered Decision on the duration of the "mediation process," and entered the Mediation Order and General Mediation Order which expressly provides for the duration of the "mediation process" (i.e. from March 2008 through the filing of the Mediator's Report on June 6, 2008). Accordingly, three (3) separate orders of this Court have addressed the duration of the mediation for purposes of protecting confidentiality and this Court has ruled that KL may not make blanket requests for Mediation Communications from the Mediation participants made during the "mediation process."

In addition to entering an injunction to protect or effectuate its orders, this Court may also enjoin KL from filing a motion to compel production of Mediation Communications in the DC Action to prevent unnecessary or vexatious litigation. *Sperry*, 288 F.2d at 249. Moreover, where the court believes that an action is being brought elsewhere to undermine a decision already made by this court, an injunction is proper. *Id.* Clearly KL's intent to file a Motion to Compel in the DC Action without the Representative's knowledge[3], and to preclude the Representative from appearing to defend this Court's orders, reflects KL's vexatious litigation and its intent to undermine this Court's Mediation Orders. Further, any consensual production of Mediation Communications by Mandl, likewise constitutes a violation of the Mediation Orders.

[3] Again, the Representative only became aware of KL's informal demands for mediation communications and its intent to file a Motion to Compel production of Mediation Communications because it was contacted by Mandl's counsel, who, itself, declares that it will not defend this Court's orders and will turn over all requested documents to KL if the Representative does not appear in the DC Action or is precluded from doing so. *See* WC Letter and Hall Letter; Sessions Transcript at 28, 33-37.

Finally, this Court may impose an injunction in aid of its jurisdiction, inasmuch as this Court retains exclusive jurisdiction over interpretation of the Decision Order, the Mediation Order and the General Mediation Order, *CSI Inv. Partners II, L.P. v. Cendant Corp*, 2006 U.S. Dist. LEXIS 11014, *5 (SDNY 2006).

Further, the All Writs Act, 28 U.S.C. §1651(a), authorizes federal courts to "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).

Based upon the foregoing, the Representative requests that this Court enjoin KL from seeking production of any Mediation Communications made during the "Mediation Process" (i.e. March 1, 2008 through June 6, 2008) unless made by application to this Court (and this Court only), and pursuant to applicable federal law and orders of this Court.

III. The Unsecured Claim Fund, established under Teligent's Plan, is entitled to the DC Proceeds from the DC Action

The Settlement Agreement provides that, in addition to receiving $6 million in cash remuneration from the Mandl from non-DC Action assets, to the extent Mandl obtains a judgment in the DC Action, Mandl must remit the DC Proceeds to the Representative for the benefit of the Unsecured Claim Fund. Exhibit B, **Settlement Agreement at 15.**

As this Court held that it was never asked to nor rendered a decision on the issue of the propriety or legality of the remittance of the DC Proceeds to the Representative, Decision, 417 B.R. 209, 211, the Representative now moves this Court to enter an order finding that the remittance of the DC Proceeds to the Unsecured Claims Estate Representative is permissible under applicable New York law and/or applicable Bankruptcy law and enjoining KL from seeking an order in the DC Action that would or could be in conflict with an order of this Court and impair the Representative's right in property of Teligent's estate.

a. Declaratory Action

Under the Declaratory Judgment Act, 28 U.S.C.S. § 2201, a bankruptcy court may enter declaratory relief, whenever a party poses a real threat of litigation. *In re Spencer,* 7 BR 458 (Bankr.S.D.Ca.1980).

28 U.S.C. 2201 provides,

§ 2201. Creation of remedy

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 USCS § 7428], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 USCS § 1516a(f)(10)]), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The objectives of Federal Declaratory Judgment Act (28 USCS §§ 2201 et seq.) are to avoid accrual of avoidable damages to one not certain of his rights and to afford him early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued; an additional purpose is to clarify legal relationships before they have been disturbed or a party's rights violated. *Travelers Ins. Co. v Davis,* 490 F2d 536 (3rd Circuit 1974). Once subject matter jurisdiction exists, a court may proceed with declaratory relief action without *sua sponte* raising the issue of whether it should be entertained. *Government Emples. Ins. Co. v Dizol*, 133 F.3d 1220 (9th Cir. 1998). Actual threats of litigation constitute a real and immediate controversy sufficient to convey jurisdiction on the court. *Kersey v PHH Mortg. Corp*., 682 F. Supp. 2d 588 (E.D.Va. 2010).

The distinction between an abstract question and a controversy as contemplated by 28 USCS § 2201 is one of degree; the question is whether the facts alleged, under all circumstances, show there is substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of declaratory relief. *Joslin v Secretary of*

Dep't of Treasury ,832 F. 2d 132 (10th Cir. 1987). Future conduct may be sufficiently imminent to comprise an "actual controversy." *Russian Std. Vodka (USA), Inc. v Allied Domecq Spirits & Wine USA, Inc.*, 523 F. Supp. 2d 376 (S.D.N.Y. 2007). Examples of cases finding a case or controversy warranting standing to seek a declaratory judgment include: Declaratory judgment action is proper where a lender sought clarification of a promissory note provision regarding payment of proceeds following the sale of a security interest, because a suit under Declaratory Judgment Act (28 USCS § 2201) is appropriate for the contracting party seeking resolution of an actual dispute regarding the interpretation of the contract. *Lyons Sav. & Loan Asso. v Geode Co*., 641 F. Supp. 1313 (N.D.Ill 1986); A declaratory judgment action will be entertained to help resolve a controversy involving whether Medicare can seek reimbursement from a tentative medical malpractice settlement achieved in state court, because (1) the state court cannot otherwise proceed to closure since the proposed settlement is conditioned upon a resolution of this action, (2) the patient's family and Medicare are "adverse" in that they seek diametrically opposed answers to questions regarding the right to Medicare reimbursement, and (3) there is "sufficient immediacy and reality" about the controversy to warrant relief in the federal court forum. *Estate of Foster by Foster v Shalala,* 926 F. Supp. 850 (N.D. Iowa 1996).

Similarly and firstly, in the case at bar, the Representative seeks clarification of its rights under the Settlement Agreement (i.e. a contract) with respect to property of the estate (i.e. the DC Proceeds) over which the Bankruptcy Court has exclusive subject matter jurisdiction.

Secondly, the Representative, Mandl and KL are clearly adverse to each other on this issue. KL has repeatedly expressed its intention to seek to void the Representative's rights in the DC Proceeds and Mandl has supported KL in its endeavor to have this matter heard in the DC Court. This intent is elucidated in the KL Answer (Exhibit D hereto) filed in the DC Action, in its objection filed to the Representative's Cross-Motion (Docket No. 03-2523, Doc. No. 235 at 16-25) and its brief filed in the appeal of the Decision in the District Court (Docket No.09-cv-9674, Doc No. 29 at 8-12) and Second Circuit Court of Appeals (Docket No. 10-2257, Doc. No.

96 at 69-89). Mandl has variably aligned himself with KL and the Representative before this Court (Docket No. 03-2523, Doc No. 243) and on the appeal of the Decision and would potentially profit from the voiding of the Representative's rights in the DC Proceeds (to the extent the entire DC action was not then voided). Further, and of significant importance, both Mandl and KL contend that the Representative would have no standing in the DC Action to contest a motion by KL to void the DC Proceeds arguing that the Settlement Agreement prohibits the Representative from appearing in the DC Action. (Docket No. 10-2257, Doc. No. 96 at 2-3, 30, 46, 114). Accordingly, KL and Mandl seek to have the DC Court address the Representative rights in the DC Proceeds without providing the Representative with due process.

Third, KL's action to void the Representative's rights in the DC Proceeds in the DC Action is imminent.

Finally, inasmuch as the right in the DC Proceeds constitutes property of Teligent's estate under 11 U.S.C. § 541, a determination of the Representative's right in the DC Proceeds must be made by this Court before the DC Action may proceed.

Accordingly, the Representative seeks the entry of a Declaratory Judgment in connection with the DC Proceeds declaring that (a) the DC Proceeds are property of Teligent's estate under 11 U.S.C. § 541 (b) the Representative is entitled to the DC Proceeds under New York law and (c) KL is bound by this decision and is stay and enjoined from impairing the Representative's rights in the DC Proceeds in the DC Action.

b. This Court has exclusive jurisdiction over the Settlement Agreement and Property of Teligent's Estate

As represented by its affirmative defense set forth in its Answer, and statements set forth in papers before this Court and appellate courts, KL intends to move before the DC Court in the DC Action to seek a determination on the same exact issues and facts presented to this Court in this motion; namely, (i) which law is applicable to the Representative's right to the DC Proceeds and (ii) does applicable law permit the Representative to enforce said rights in the DC Proceeds.

We respectfully assert that this Court has exclusive jurisdiction to address this issue and that the Court's finding is binding on the Representative, Mandl and KL under principles of res judicata and collateral estoppel.

i. This Court has Exclusive Jurisdiction pursuant to the express terms of the Settlement Agreement

Paragraph 24 of the Settlement Agreement, governing jurisdiction, provides:

> Retention of Jurisdiction by the Bankruptcy Court. The Bankruptcy Court retains jurisdiction with respect to any and all issues arising with respect to this Agreement and enforcement thereof.

Exhibit B, Settlement Agreement at 26, ¶ 24.

Pursuant to the Settlement Agreement Order (Exhibit A), this Court ordered that:

> 1. The Agreement is hereby approved pursuant to Bankruptcy Rule 9019 and the Procedures Order *and the Parties to the Agreement shall have the rights and privileges set forth in the Agreement*…
>
> 2. The *Representative is authorized to take all such action necessary under the Agreement to effectuate the Agreement*.

Exhibit A, **Settlement Agreement Order** at 1-2 (emphasis added). Accordingly, pursuant to the terms of the Settlement Agreement, this Court has exclusive jurisdiction over the interpretation and enforcement of the Settlement Agreement.

ii. This Court has exclusive jurisdiction under Teligent's Plan

Furthermore, under the Plan, the Bankruptcy Court retains jurisdiction over the Unsecured Claim Fund, the Chapter 5 Causes of Action and any conflicts that arise in connection therewith and property of Teligent's estate. The relevant sections of the Plan are as follows:

> **ARTICLE I. DEFINED TERMS, RULES OF INTERPRETATION, COMPUTATION OF TIME AND GOVERNING LAW**
>
> *A. Rules of Interpretation, Computation of Time and Governing Law*
>
> *32. Funds*: The Claim Fund, the Professional Fee Reserve Fund and the Unsecured Claim Fund.

Plan at 1.

ARTICLE III. CLASSIFICATION AND TREATMENT OF CLASSIFIED CLAIMS AND EQUITY INTERESTS
*****

5. Class 5 - General Unsecured Claims.

****

(b) Treatment: On the Effective Date, the Chapter 5 Causes of Action and the Unsecured Claim Fund will be transferred to the Unsecured Claims Estate Representative. Any proceeds from the Chapter 5 Causes of Action will be used first to reimburse Reorganized Teligent for the Unsecured Claim Fund. Any remaining proceeds will be distributed Pro Rata to holders of Allowed Class 5 Claims. In consideration for the Creditors' Committee support of the Plan, the Lenders have made this portion of their recovery available to Holders of Allowed Unsecured Claims.

Plan at 10.

ARTICLE X. RETENTION OF JURISDICTION

The Bankruptcy Court will retain and have exclusive jurisdiction over the Chapter 11 Cases for the following purposes:

****

5. to determine applications, adversary proceedings and contested or litigated matters and all Chapter 5 Causes of Action, whether pending on the Effective Date or commenced thereafter;

****

8. to issue orders in aid of execution of the Plan to the extent authorized by section 1142 of the Bankruptcy Code;

9. to determine such other matters as may be set forth in the Confirmation Order or as may arise in connection with the Plan, the documents filed pursuant to the Plan Supplement or the Confirmation Order;

****

12. to determine any matter or dispute in connection with the Funds;

13. to issue injunctions, enter and implement other orders to take such other actions as may be necessary or appropriate to restrain interference by any Person with consummation, implementation or enforcement of the Plan, the documents filed pursuant to the Plan Supplement or the Confirmation Order.

Plan at 17.

iii. This Court has exclusive jurisdiction over the disposition of Property of the Debtor's estate

The Representative's rights in the DC Proceeds, which such asset was recovered under a Settlement Agreement arising from a Chapter 5 cause of action, constitute property of Teligent's estate over which this Court has exclusive jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. §§541(a)(3) and (4).[4]

28 U.S.C. §157 provides in relevant part that,

§ 157. Procedures.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

(2) Core proceedings include, but are not limited to—

****

(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover preferences;

[4] While this Court opined in the Decision that the Representative might receive "$0" from the DC Proceeds, Decision, 417 B.R. at 211, the Court addressed this issue in the context of determining whether the total remuneration under the Settlement Agreement "was a fair and reasonable resolution" of the Adversary Proceeding. *Id.* The issue before this Court now is the impact the DC Action and KL's express intent to attempt to void the Representative's rights in the DC Proceeds (i.e. property of Teligent's estate). The Court correctly elucidated at the hearing on the Cross-Motion, "But 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." *Transcript, Mediation Hearing* May 12, 2009 at 37, lns 10-14. Caselaw has long established that the fact that a debtor may not receive any of the proceeds from a cause of action, insurance policy, or other asset, "does not affect its status as property under the Code subject to the provisions of the automatic stay." *In re Johns-Mansville Corporation, et al. v. The Asbestos Litigation Group* (*In re Johns-Mansville, et.al.)*, 40 B.R. 219 at 230 (S.D.N.Y. 1984); *See also In re Mego International, Inc.*, 28 B.R. 324 (S.D.N.Y. 1983). If an action has a conceivable outcome of being resolved in Mandl's favor, thus enriching Teligent's estate and its creditors, that outcome is sufficient to establish this Court's jurisdiction over the property of the estate affected. *Raytech Corporation, et.al. v. Stefanutti (In re Raytech Corp.)*, 238 B.R. 241, 243 (Bankr.D.Conn. 1999). *See also In re Kolinsky,* 100 B.R. 695, 704-705 (Bankr.S.D.N.Y. 1989). If a bankruptcy court had to wait until the outcome of every litigation to ascertain whether an asset of a debtor constituted property of the estate, a cause of action could never constitute property of a debtor's estate and would be in direct conflict with the unambiguous provisions of § 541. Moreover, the risk of extinguishment of a right in property of the estate via a state court action, compels the Bankruptcy Court to enjoin such action, or such portion of that action that threatens the extinguishment of the debtor's property. *In the Matter of Dilbert's Quality Supermarkets, Inc.*, 368 F.2d 922, 924 (2d Cir. 1966).

(G) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;

For example, in *Harper v.* Harper, the Third Circuit held that the Bankruptcy court had core jurisdiction under 28 USCS § 157(b) and had power to issue a final judgment with regard to claim of a corporate debtor's president that the personal guaranty he gave for payment of a signing bonus was void as part of illegal stock redemption or fraudulent conveyance as the claim appears to fit within examples in 28 USCS § 157(b)(2)(B) and 28 USCS § 157(b)(2)(H), the president specifically alleged granting of signing bonus was fraudulent transfer under New Jersey law and federal bankruptcy law, and the claim invoked trustee's power to avoid fraudulent transfers under 11 USCS § 548. *Halper v Halper* 164 F.3d 830 (3d Cir. 1999).

In *Moreley v. Ontos (In re Ontos)*, the First Circuit held that because the trustee's motion for approval of a stipulation and release of state law claims against the debtor, its directors and board members, for a fraudulent conveyance, breach of fiduciary duty, and alter ego liability fell within definition of core proceedings, settlement of disputed claims concerned administration of estate and liquidation of assets under 28 USCS § 157(b)(2)(A), (H), (O), and the bankruptcy court had jurisdiction over the stipulation. *Morley v Ontos, Inc. (In re Ontos, Inc.)*, 478 F3d 427 (1st Cir. 2007).

Finally, in *Addison v. O'Leary,* the Court held that the Chapter 7 trustee's fraudulent and voluntary conveyance actions against officers of corporate debtor are not unconstitutionally heard state law claims in Bankruptcy Court, under *Northern Pipeline*, because, in these actions, while state law does provide some substantive law, state law can be modified to conform to needs of Bankruptcy Code; further, the trustee's actions are formally against debtor, not nonbankruptcy third parties, and are designed to adjust relationship between debtor and creditors by impairing estate assets. The Court held that it is federal law that gives the trustee the right to proceed to impose a constructive trust on the transferees. Thus, the actions are not simply private disputes, but involve "public rights" and there is sufficient nexus between federal law and claim to make

constitutional 28 USCS § 157(b)(2)(H)'s designation of these actions as core proceedings. *Addison v O'Leary,* 68 B.R. 487 (E.D. Va. 1986).

28 U.S.C. § 1334 provides in relevant part that,

§ 1334. Bankruptcy cases and proceedings

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--
(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate;

In *In re Stein*, the Court held that under Section 1334, where a non-debtor agreed to share the proceeds of a property sale with the Chapter 7 estate, settling a fraudulent conveyance claim brought by trustee, and the settlement was approved by bankruptcy court, the bankruptcy court had jurisdiction to order a dismissal of the state court action filed by creditors, which sought to block the property sale and assert a fraudulent conveyance claim against the non-debtor. *In re Stein*, 314 B.R. 306 (D.N.J. 2004).

11 U.S.C. § 541 provides in relevant part that,

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

****

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title [11 USCS § 329(b), 363(n), 543, 550, 553, or 723].

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title [11 USCS § 510(c) or 551].

(c)

(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor;

Accordingly, property recovered by a trustee pursuant to 11 U.S.C. § 541(a)(3) and (4) constitutes property of Teligent's estate. *In re Colonial Realty Co*., 980 F.2d 125, 131 (2d Cir. 1992).

In the decision entered by this Court after the trial in the Adversary Proceeding (the "**Trial Decision**"), 380 B.R. 324 (Bankr.S.D.N.Y 2008), this Court awarded the Representative a $12 million judgment and the right to recover the value thereon under 11 USC §§ 548, 550. *Id.* at 338. As such, any property recovered or to be recovered, including the Representative's rights in the DC Proceeds, constitutes property of Teligent's estate. *Green v. Mucelli (In re Mucelli)*, 21 B.R. 601, 604 (Bankr.S.D.N.Y.1982) (Under New York law, the Trustee's rights in proceeds from personal injury action is characterized as an equitable assignment which is permissible as a matter of public policy, and the interest in such proceeds constitutes property of the debtor's estate); *In accord In re Corbi*, 149 B.R. 325 (Bankr. E.D.N.Y. 1993); *In re DeBerry*, 59 B.R. 891 (Bankr. E.D.N.Y. 1986); *Ryen v. Terry (In re Terry)*, 56 B.R. 713, 715 (Bankr.W.D.N.Y. 1986).[5]

> Story, in his Equity Jurisprudence, in section 1040, says:
>
> Courts of equity will support assignments, not only of choses in action, and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility; not, indeed, as a present, positive transfer, operative *in presenti*,…. but a present contract to take effect and attach as soon as the thing comes *in esse*.

Green, 21 B.R. at 603 quoting *Williams v. Ingersoll*, 89 N.Y. 508 (1882).

Accordingly, the conditional, future, speculative, or equitable nature of the Representative's interest in the DC Proceeds does not prevent it from becoming property of the bankruptcy estate. *Id.*; *Anderson v. McGowen (In re Anderson)*, 128 B.R. 850 (D.R.I. 1991).

[5] Moreover, because the DC Proceeds, when received, must be held, pursuant to the express terms of the Settlement Agreement, in an attorney trust account for and until distribution to the Representative, the Representative will have an express trust in connection with the DC Proceeds when they are received by Mandl's counsel. Settlement Agreement at 18 ¶ 5.6

Because the DC Proceeds are property of Teligent's estate under Section 541, this Court has exclusive jurisdiction over the DC Proceeds under 28 U.S.C. §§157 and 1334 and may not cede jurisdiction over the Representative's rights in the DC Proceeds to the DC courts.

c. The Settlement Agreement Order and Settlement Agreement are binding and must be enforced pursuant to their express and unambiguous terms

i. *The Settlement Agreement and Settlement Agreement Order are binding and must be enforced*

Where judicial approval was necessary for a transaction to go forward, an agreement could not be binding absent the required approval. *See In re Frye*, 216 B.R. 166 (Bankr. E.D. Va. 1997). Axiomatically, an agreement is binding on the bankruptcy estate after notice and hearing as required by the Bankruptcy Code. *Rinehart v. Stroud Ford, Inc. (In re Stroud Ford, Inc.*), 205 B.R. 722, 725 (Bankr. M.D. Pa. 1996).

As one court has explained, "[p]arties 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. The law should be crafted and construed to provide certainty and predictability. Contracting parties are entitled to the assurance that their settlement agreements are valid and effective even though their performance obligations have yet to arise." *Musselman v. Stanonik (In Seminole Walls & Ceilings Corp.)*, 388 B.R. 386, 395 (M.D. Fla. 2008). *See also Travelers Indemnity Co. v. Bailey*, 557 U.S. --, 129 S. Ct. 2195, 2203-04, 174 L.Ed.2d 99 (2009).

Pursuant to the Settlement Agreement Order, the Representative is availing itself of the express provisions of the Plan and the Settlement Agreement as mandated by the express terms of the Plan and Settlement Agreement Order and seeks an order from this Court clarifying and enforcing the Settlement Agreement.

Moreover, once a federal court enters an order, it retains *exclusive jurisdiction* over matters related to and interpretation of the judgment. In *United States* v. *Am. Soc'y of Composers*

(In re Karmen), 32 F.3d 727 (2d Cir. 1994), the Second Circuit held that the Southern District of New York retained exclusive jurisdiction over matters related to a judgment and that retaining jurisdiction was a proper exercise of its authority so that it could "protect or effectuate its judgments." *Id.* at 731 (citing 28 U.S.C. § 2283). The Second Circuit noted that:

> As we determined over 20 years ago, a federal district court has exclusive jurisdiction over actions that, if left to the state courts to decide, would frustrate the federal court's continuing jurisdiction over and implementation of the consent judgment between [the parties] and the government.

ld (citing *United States* v. *ASCAP,* 442 F.2d 601, 603 (2d Cir.1971); *see also United States* v. *City of New York,* 972 F.2d 464, 469 (2d Cir.1992) (affirming removal of state law actions to federal court, where issues raised in state court could not be separated from the relief ordered in a consent decree).

ii. Pursuant to the express and unambiguous terms of the Settlement Agreement, Bankruptcy Law and Rules and the substantive laws of the State of New York are applicable to the Settlement Agreement

Paragraph 23 of the Settlement Agreement provides:

> Governing Law. This 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.

Exhibit B, **Settlement Agreement at 25, ¶ 23.**

The Settlement Agreement Order provides that Mandl and the Representative *"shall have all the rights and privileges set forth in the Agreement" and that the "Representative is authorized to take all such action necessary under the Agreement to effectuate the Agreement.*

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. at 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.

Moreover, "New York law is clear in cases involving a contract with an express choice-of-law provision: Absent fraud or a violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction." *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972)(forum selection clauses are *prima facie* valid and "generally enforced absent strong showing that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."); *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386 (2d Cir. 2001). Because 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, (*In re Iridium Operating LLC*, 478 F.3d 452, 462 (2d Cir. 2007), *Plaza Equities LLC, v. Pauker (In re Copperfield Investments, LLC),* 401 B.R. 87, 92 (Bankr. E.D.N.Y. 2009), *In re Texaco Inc.*, 84 B.R. 893, 902 (S.D.N.Y. 1988)), and this Court approved the Settlement Agreement, it *ipso facto* found the Settlement Agreement was negotiated in good faith. Accordingly, as this is law of the case, we ask this Court to apply this finding to this Motion.

In light of the foregoing, it is respectfully submitted that the Bankruptcy Court is duty-bound to determine, by operation of law, that New York law is applicable the DC Proceeds provision of the Settlement Agreement.

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), *question cert.* 5 N.Y. 3d 730, 832 N.E.2d 1185, 799 N.Y.S.2d 769 (2005) *settled by* 421 F.3d 124 (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). *See also Savage & Associates v.* Mandl, 417 B.R. at 212 n.6 citing *Aponte v. Maritime Overseas Corp.*, 300 F.Supp 1075, 1077 (S.D.N.Y. 1969) and *Sierra v. Garcia*, 562 N.Y.S.2d 624, 625 (N.Y.App.Div.1990)("In fact, New York law permits the assignment of the proceeds of a tort claim even where the claim itself is not assignable.").

Accordingly, the DC Proceeds provision in the Settlement Agreement is a lawful and binding provision in all respects. *Travelers Indemnity Co. v. Bailey,* 557 U.S. --, 129 S. Ct. 2195, 2203 (2009); *Celotex Corp v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995).

d. Even were D.C. law applicable to and could serve to void the DC Proceeds provision, under applicable Bankruptcy Law, the Court may approve and enforce the DC Proceeds Provision without regard to and in light of *Integrated*

KL has recently contended that DC law is applicable to the DC Proceeds provision of the Settlement Agreement. Even if that were true, under applicable bankruptcy law Mandl could still transfer to the Representative the right in the DC Proceeds.

In connection with its objection filed to the Representative's Cross-Motion, KL cited *Integrated Solutions, Inc. v. Service Support Specialties*, 193 B.R.722 (D.N.J. 1996), *aff'd.* 124 F.3d 487 (3d Cir. 1997), for the sweeping proposition that state property law which prohibits assignment of malpractice actions or their proceeds, may not be preempted by federal bankruptcy law. [Docket No.03-2523, Doc.No. 235 at 17-19].

Both KL's characterization of *Integrated* holding and its purported scope are erroneous.

i. Integrated Solutions holds that State law may not preclude property from passing to a debtor's estate under 11 U.S.C. § 541

The Third Circuit in *Integrated* distinguishes between transfers of property of a debtor's estate **to** a debtor/trustee, on the one hand, from transfers **by** a debtor to a third party, on the other hand.

With respect to transfers of property of a debtor's estate made by a third party **to** the debtor/trustee the Third Circuit in *Integrated* expressly held that

> We have previously noted that the broad sweep of §541 and the fact that the section expressly includes "causes of action" as a property interest included in the estate. [citations omitted]. Given §541's broad scope, its legislative history, and the weight of authority of other jurisdictions, *we conclude that state laws prohibiting the assignment or transfer of property, including causes of action and tort claims, do not prevent the inclusion of such property in the bankruptcy estate*.

Integrated, 124 F.3d at 490 (emphasis supplied).

Moreover, the Third Circuit held that Section 541 "includes all interests, such as ….tangible and intangible property, choses in action [and] causes of action…*whether or not transferable by the debtor.* [H.R. Rep.No. 95-595. at 175-176 (1977), reprinted in 1978 USCCAN 5963,] at 6136 (emphasis supplied)." *Integrated,* 124 F. 3d at 490 (emphasis in original).

As discussed hereinabove, the DC Proceeds constitute property of Teligent's estate as they are an "interest in property that the [Representative recovered] under Section [] 550," 11 U.S.C. §541(a)(3), inasmuch as the Representative "recover[ed], for the benefit of the estate, the property transferred [i.e. $12 million], or [as] the court so order[ed], the value of such property, from "the initial transferee [i.e. Mandl] of such transfer," 11 U.S.C. §550(a)(1). The property recovered is also property of the estate under 11 U.S.C. §541(a)(4) as it was preserved under §551.

Because the Representative's interest in the DC Proceeds is an equitable assignment of the interest in the DC Proceeds and constitutes property of Teligent's estate, *Green v. Mucelli (In re Mucelli)*, 21 B.R. 601 (Bankr.S.D.N.Y.1982), the recovery (i.e. transfer of this asset by Mandl to the Representative as property of Teligent's estate) is authorized by Section 541, as acknowledged by *Integrated*, regardless of whether the Representative is free to then transfer the asset to another person (which the Representative has no intention of doing other than distribute the proceeds to Teligent's General Unsecured Creditors).

ii. Integrated would not prohibit the Representative from transferring the right to the DC Proceeds in any event

Second, in *Integrated*, the only state law at issue was that of New Jersey, which the Court found prohibited an assignment of a malpractice action. The only question was whether the objectives of Section 363 (to sell assets and reduce the debtor's assets to cash for distribution) and §704(1) of the Bankruptcy Code trumped New Jersey law. KL relied upon the *Integrated* holding, in which the Bankruptcy Court determined that "notwithstanding the bankruptcy court's approval order, state property law, not federal law, governed [the] analysis," because the court held that the state tort claim could not be assigned **by** the trustee.

Ultimately, in addition to the factual situation at bar being totally distinguishable, KL overstates the holding and, thus, applicability, of *Integrated*. As discussed in *American Home Mortgage Holdings, Inc. v. DB Structured Products, Inc.*, 402 B.R. 87 (Bankr. D. De. 2009).

> DBSP overstates the holding of *Integrated Solutions*, which did not involve contractual "anti-assignment rights" and was not decided under §363(l). In that case, a purchaser obtained prejudgment tort claims through a §363 sale from a Chapter 7 bankruptcy trustee and then sued on the claims. The defendants moved to dismiss for lack of standing, arguing that applicable state law prohibited the assignment of prejudgment tort claims and, accordingly that the trustee was the only party with standing to bring the claims. The purchaser argued that 11 U.S.C. §§704((1) (requiring the trustee to expeditiously collect and reduce to money property of estate and 363(b)(1)(permitting trustee to sell property outside the ordinary course of business) preempted state-law restrictions on the transfer of the tort claims, which constituted property of the bankruptcy estate. The bankruptcy court disagreed with the purchaser and granted the defendant's motion to dismiss.
>
> On appeal, the Third Circuit considered the following, narrow question: "Did Congress intend to preempt state law restrictions on the assignability of tort claims under federal bankruptcy law?" *Integrated Solutions*, 124 F.3d at 490. The Court found nothing in §§704(1) or 363(b)(1) expressly authorizing the trustee to sell property free of state-law restrictions and nothing in the legislative history indicating Congress intended such a result. This was underscored by the fact that other provisions of the Bankruptcy Code, including §363(l), expressly displaced otherwise applicable law. Accordingly, the Court concluded that "neither §363(b)(1) nor §704(1) indicates a specific congressional intent to preempt state laws limiting the assignability of tort claims belonging to the estate." *Integrated Solutions*, 124 F.3d at 494. *It is evident from this narrow holding that the court might reach a different result under different circumstances—e.g., if state law restricted assignment of prejudgment tort claims by a bankruptcy trustee specifically, which would implicate §363(l) of the Bankruptcy Code.*

American Home, 402 B.R. at 102-03. (emphasis added).

In *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), the Third Circuit provided further clarity of the *Integrated* decision. In *Combustion*, under a plan of reorganization, the debtors sought to transfer certain insurance policies to a plan trust pursuant to Section 524 of the Bankruptcy Code. The subject insurers objected to this transfer alleging that such a transfer violated the express anti-assignment clauses of the insurance policies. The *Combustion* court, in citing Section 541(c)(1) (which provides in relevant part that: (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law") ruled that "[p]ut simply, §541 prohibits restrictions on the interests of the debtor, which includes the insurance policies held by Combustion Engineering." *Combustion,* 391 F.3d at 219. Notably, the Third Circuit did not mention *Integrated* as a limiting factor in the *Combustion* decision.

This fact was pointed out in *In re Congoleum Corporation*, 2008 Bankr. LEXIS 2375, *2 n.1 (Bankr. D. N.J. 2008). In *Congoleum*, the bankruptcy court was confronted with a similar issue addressed in *Combustion*, namely, whether the anti-assignment provisions of the debtors' insurance policies were preempted by federal insurance law. Relying on *Combustion,* the *Congoleum* court concluded that the policies constituted property of the debtor's estate under Section 541, and that Section 541 preempts any contractual provision that purports to limit or restrict the rights of a debtor to transfer or assign its interest in bankruptcy. When the *Congoleum* court was confronted with the *Integrated* decision by one of the parties, the *Congoleum* court stated,

> The Court does not find that *Integrated Solutions v. Service Support Specialties, Inc.*, 124 F.3d 487 (3d Cir. 1997) compels a different result. First, that case is distinguishable because it addressed the preemptive effect of §§704(1) and 363(b)(1) rather than §1123.
>
> Second, *Integrated* was decided seven years before Combustion and therefore this Court must assume that the Court of Appeals was aware of it when it decided Combustion and simply did not find it relevant to its analysis (A) that restricts or conditions transfer of such interest by the debtor

Congoleum, 2008 Bankr. LEXIS 2374, at *6 n.1.

Likewise, *Integrated* is factually and legally distinguishable from the case at bar.

First, in *Integrated*, the debtor was the *owner/claimant* of the tort claim at the time the debtor filed chapter 11. The *Integrated* court explained the tort claim at issue constituted property of the debtor's estate pursuant to 11 U.S.C. § 541. *See Integrated*, 124 F.3d at 490-491. *The trustee then sought to sell the tort claim* pursuant to §363(b)(1) and §704(1) to liquidate the estate and maximize assets for distribution to creditors. Unlike the trustee in *Integrated*, neither the Representative, as the appointed litigation trustee in the Teligent, Inc. Chapter 11 case, nor Mandl, tried to transfer Teligent's (i.e. the debtor's estate's) interest in a tort claim (i.e. the D.C. Action). The Representative merely seeks to enforce its rights under Sections 541 and 550 and FRCP 69 in connection with the DC Proceeds.

Moreover, because the equitable assignment of the interest in the DC Proceeds themselves and the DC Proceeds are property of Teligent's estate under §541(a)(3) and (4), the *Bankruptcy Court retains exclusive subject matter jurisdiction over the DC Proceeds. See also Schmidt v. U.S. Marshal Service (In re Villarreal)*, 2007 Bankr. LEXIS 463, *8-13 (Bankr. S.D.Tx. 2007); *Logan v. Credit General Insurance Co (In re PRS Ins. Group, Inc.)*, 335 B.R. 77, 81-82 (Bankr. D.De. 2005); *Seitz v. Freeman (In re Citx Corporation)*, 302 B.R. 144, 157-159 (Bankr. E.D.Pa. 2003); 28 U.S.C. §§157 and 1334.

As set forth in the Bankruptcy Court's decision entered after the trial in the Adversary Proceeding, after awarding Savage a judgment in the sum of $12 million, the Court discussed Savage's right of recovery under Section 550:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from...the initial transferee....
>
> *********

> I [] conclude that the plaintiff is entitled to recover the amount of the released obligation. The fraudulent transfer provisions of the Bankruptcy Code are intended to allow a trustee to recover property that would otherwise have been available to the estate and its creditors. []
>
> The granting of the release was the equivalent of the transfer of a $12 million cause of action. *As with any successful avoidance action, the plaintiff can recover the transferred asset or its value. The recovery of the cause of action to collect the loan effectuates §550(a), and provides the unsecured creditors with the value taken from Teligent through the transfer.* []
>
> Accordingly, the plaintiff is entitled to recover a judgment on her constructive fraudulent transfer claim in the amount of $12 million.

Savage & Associates, P.C. v. Mandl (In re Teligent Inc.), 380 B.R. 324, 337-338 (Bankr. S.D.N.Y. 2008). The Representative thus obtained the right to recover the $12 million judgment from *any* of Mandl's assets, including Mandl's malpractice claim against KL and/or the proceeds thereof that Mandl under Bankruptcy and New York law and, because the Bankruptcy Court has exclusive subject matter jurisdiction over the disposition of assets recovered and constituting property of Teligent's estate under Section 541(a)(3) and (4) and 28 U.S.C. §§ 157 and 1334, the Bankruptcy Court may not abdicate its exclusive jurisdiction to the DC Court.

Second, New York law is specified in the Settlement Agreement (and approved by the Settlement Agreement Order) to apply to its interpretation and enforcement, and assignments of a malpractice claims or its proceeds are permitted under New York law.

Third, unlike the *Integrated* party, KL effectively admits it would have had standing to appeal an order entered on this Motion because it admits that it has standing to commence the very same motion implicating the very same issues, facts and parties in the DC Action and that it has a financial stake in the outcome of the Court's decision not only because it fears inflated damages arising from Mandl's payment of the DC Proceeds to Savage, but because it also hopes to void the DC Proceeds provision and, by extension, the entire DC Action under DC law. *See Edens Techs LLC v. Kile Goekjian Reed & McManus PLLC*, 675 F.Supp.2d 75 (D.D.C. 2009). A ruling by this Court that the DC Proceeds provision is binding on the Representative, Mandl and KL under New York Law enjoins KL from using the voiding of the DC Proceeds provision to

void the DC Action. This factor is crucial because if the situation comes down to two (2) competing orders (i.e. this Court's and the DC Court's), one sanctioning the DC Proceeds provision (i.e. the federal court) and one voiding it (i.e. the DC Court), the attainment by the Representative of a federal court order sanctioning the DC Proceeds provision is a pyrrhic victory as KL will be able to undermine this order via a competing state court order on the same exact facts, transactions, issues and parties, thus impairing the Representative's right to property of Teligent's estate to the extent Mandl can obtain a settlement/judgment on the merits of the DC Action.

Fourth, unlike the situation in *Integrated*, the D.C. Action was commenced prior to the filing and service of the 9019 Motion and was thus not hypothetical.

Fifth, with respect to preemption, because New York law allows the assignment of the DC Proceeds, there is no conflict between controlling New York law and federal law that would implicate preemption (notably, the Third Circuit and District Court in *Integrated* allowed Integrated to pursue a copyright claim because it was freely assignable under federal law.)

Finally, the party in *Integrated* did not argue res judicata or rights under the All Writs Act, 11 U.S.C. §105, or any exception to the Anti-Injunction Act, as the Representative argues here.

KL failed to address why New York law is not the applicable law with respect to the assignment of DC Proceeds to the Representative. Moreover, KL failed to explain or cite any cases that explain why Section 541(a)(3) and (4) and FRBP 7069, which, respectively, render the DC Proceeds property of Teligent's estate and compels the application of New York law with respect to enforcement of property rights under the Settlement Agreement, are not implicated under preemption principles when KL seeks to obtain a ruling under DC law that New York law is inapplicable and that DC law prohibits the assignment of the DC Proceeds (i.e. assets which constitute property of Teligent's estate under §543(a)(3) and *over which the Bankruptcy Court retains exclusive subject matter jurisdiction*), thus setting up the conflict with Savage's federal

law rights to enforce the Settlement Agreement under FRBP 9019 and 7069 (as well as FRBP 9070 in the event Mandl fails to transfer the DC Proceeds as required under the Settlement Agreement). FRCP 70 (FRBP 7070) is designed to deal with parties who seek to thwart judgments by refusing to comply with orders to perform specific acts. If Mandl fails to comply with the Settlement Agreement because of a conflicting DC order, there will be a further direct conflict of federal and state law as and between FRBP 7070 and the state court order.[6]

Citing *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75 (D.D.C. 2009), KL contends that, regardless of the fact that the Courts have determined that FRBP 7069 preempts conflicting state law and allows enforcement against property under the state law (or other applicable federal law) where the court sits, regardless of where the property is located (s*ee Spain v. Mountanos*, 690 F.2d 742, 744-45 n.3 (9th Cir. 1982); *Gary W. v. State of Louisiana*, 622 F.2d 804, 806 (5th Cir. 1980) *cert. den.* 450 U.S. 994, 101 S.Ct. 1695, 68 L.Ed. 2193 (1981); *Hankins v. Finnel*, 759 F. Supp. 569, 573-574 (W.D. Mo. 1991), *aff'd*, 964 F.2d 853 (8th Cir. Mo. 1992) *reh.en.banc.den.* 1992 U.S. App. LEXIS 14619 (8th Cir. 1992) *cert.den.* 506 U.S. 1013, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992); *Preston v. Thompson*, 565 F. Supp. 294 (N.D. Ill. 1983)), that New York law is not applicable to the Representative's rights under the Settlement Agreement.

Finally, the *Edens* court recognized the free assignability of malpractice claims (and its proceeds) in New York. *Edens,* 675 F.Supp.2d at 82.

Accordingly, *Integrated* is applicable to the extent that it recognizes that no conflicting state law can impair property of the debtor's estate from entering the estate (i.e. the DC Proceeds under Section 541(a)(3) and (4)) and is inapplicable with respect to the balance of its discussion

[6] Preemption may be implied if state and federal laws conflict or a state law thwarts the "accomplishment and execution" of congressional intent. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983). Moreover if Congress has passed a pervasive federal legislative scheme leaving states no room to supplement, then state law will also be preempted. *David v. Davis (In re Davis)*, 170 F.3d 475, 482 (5th Cir. 1999) *cert.den.* 528 U.S. 822, 120 S.Ct. 67, 145 L.Ed.2d 57 (1999) (holding FRCP 69 governs enforcement of judgment).

as the Representative is not seeking to sell a tort claim at all, much less under 11 U.S.C §§ 363 or 724.

e. 11 U.S.C. §362 Stays KL from Seeking Relief in the DC Court to the Extent it Impacts Property of the Debtor's Estate

11 U.S.C. 362 provides in relevant part that,

> § 362. Automatic stay
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > *********
> >
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

Subsection (a)(1) provides for a broad stay of legal proceedings against the debtor that was or could have been commenced prior to the commencement of the bankruptcy case, or that seek to recover a prepetition claim against the debtor. *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997)

The stay of litigation is limited to actions which could have been commenced before the commencement of the case or which are based upon claims that arose before commencement of the case. A claim arises at the time an obligation is incurred, not when it is due. Because 11 U.S.C. § 101 includes contingent, unliquidated and unmatured rights to payment within the definition of claim, the stay prevents enforcement of such claims even if they become fixed after the commencement of the case. Claims which are contingent or unliquidated before the commencement of the case nevertheless "arise" before the commencement of the case. *In re Baldwin-United Corp. Litig*., 765 F.2d 343 (2d Cir. 1985)

The stay under Section 362(a)(3) applies to attempts to obtain or exercise control over both tangible and intangible property. *See In re M.J.&K Co,* 161 B.R. 586, 593 (Bankr.S.D.N.Y. 1993); *Golden Distributors, Ltd. V. Reiss (In re Golden Distributors)*, 122 B.R. 15 (Bankr.S.D.N.Y. 1990). It also protects causes of action vested in a trustee. *In re MortgageAmerica Corp*., 714 F.2d 1266 (5th Cir. 1983).

Although the DC Action does not name the Representative as a party, and KL and Mandl have stated their respective intention to preclude the Representative from the DC Action in connection with defending its right to the DC Proceeds, this technically does not insulate KL from 11 U.S.C. §362(a)(3). *In re St. Vincents Catholic Medical Centers of New York, et.al.,* 429 B.R. 139, 146 (Bankr. S.D.N.Y. 2010) *app. dismissed* 2010 U.S. Dist. LEXIS 116298 (S.D.N.Y. Oct. 25, 2010).

> By its clear and unambiguous terms, § 362(a)(3) stays "any act…to exercise control over property of the estate." And is not limited to acts brought against the debtor. 11 U.S.C. § 362(a)(3). The language of the Code is purposefully broad to encompass a wide array of actions that seek to exercise control over property of the estate and the Court must look to the purpose of the Bankruptcy Code to interpret its meaning. *In re Comcoach Corp.,* 698 F.2d 571, 573 (2d Cir. 1983) (*citing Kokoszka v. Belford,* 417 U.S. 642, 645-46, 94 S.Ct. 2431, 41 L.Ed2d 374 (1974)). One of the Bankruptcy Code's main purposes, and the most relevant one here, "is to convert the bankrupt's estate into cash and distribute it among creditors." *In re Comcoach,* 698 F.2d at 573.
>
> *It is well established in this Circuit that <u>even if the action</u> <u>is taken against a non-debtor</u> the Court must examine the effect of the action, and if that effect "would inevitably have an adverse impact on property of the bankrupt estate, such action should be barred by the automatic stay*." *48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987).

In re St. Vincents Catholic Medical Centers of New York, et.al., 429 B.R. at 146 (emphasis added).

Judge Morris, in *St. Vincents*, ultimately held that the "State Court Plaintiffs cannot claim refuge from the automatic stay by virtue of the fact that the debtor is not named party in the state court proceeding. By seeking to exercise control over the bankruptcy estate, the State Court Action violates § 362(a)(3)." *Id. at 147.*

In the case at bar, KL intends to make a direct strike against the DC Proceeds of the DC Action, which such equitable assignment of proceeds and the proceeds themselves are property of Teligent's estate. *Green v. Mucelli (In re Mucelli)*, 21 B.R. 601, 604 (Bankr.S.D.N.Y.1982). The fact that the Representative (or Teligent) is not a party to the DC Action is not an obstacle to this Court's right to stay KL from making a motion in the DC Court in which it seeks to void the Representative's equitable interest in the DC Proceeds. *St. Vincents* at 429 B.R. at 147. Clearly, KL is seeking to circumvent this Court's exclusive jurisdiction over property of Teligent's estate and, to the extent the Representative loses its rights in the DC Proceeds, deprive Teligent's creditors of potentially the largest asset that might be recovered by the Representative for Teligent's General Unsecured Creditors. An attempt by KL to exert control over property of Teligent's estate, which property is to be converted "into cash and distribute[d] [] among creditors," constitutes one of the Bankruptcy Code's main purposes and thus, mandates the imposition of an automatic stay under Section 362. *In re Comcoach Corp.,* 698 F.2d at 573.

f. KL has standing to appear and be heard on this Motion as it relates to both Mediation Communications and the DC Proceeds

KL asserts its damage and financial stake in the issues and facts in this Motion both in its intent to file the same said motion in the DC Action and its statements in documents filed in its appeal of this Court's decision to the Second Circuit Court of Appeals. In its brief filed with the Second Circuit, KL alleges, with respect to the Representative's rights in the DC Proceeds that,

> By asserting entitlement to damages based on the Proceeds Assignment, Mandl apparently seeks to "gross up" or inflate his and Savage's recovery based on his decision to grant Savage a 50% net stake in the DC Action.
>
> By characterizing all payment obligations under the Settlement Agreement as Mandl's obligations, Mandl and Savage apparently intend to convert non-party payments into recoverable losses of Mandl. Thus, through the settlement process, Mandl and Savage have attempted to manufacture phantom damages in excess of those Mandl will ever have to pay, and to hold K&L liable for those amounts.
>
> Naturally, K&L sought discovery of the negotiations leading up to the Settlement Agreement, including all mediation and settlement communications between Savage and the Mandl Affiliates. A116. Such discovery is critical to issues such as causation, mitigation, and damages. For example, discovery could prove, as the evidence thus far

> suggests, that Mandl and Savage recognized that Savage could not recover more than about $3.190 million from Mandl, but that Mandl was concerned that Savage might succeed in the VA Fraud Action against the Mandl Affiliates. A124. And discovery could prove, as the evidence thus far suggests, that Mandl entered the Settlement Agreement not because of K&L's alleged malpractice but because he feared that Savage would claw back certain transfers that Mandl had made to Ms. Mandl and ASM and follow through on its alleged threats to bring apparent tax violations to the attention of the IRS. A296-97. Such discovery could confirm that the Mandl Affiliates and Savage colluded artificially to inflate Mandl's alleged damages and improperly to shift those inflated damages onto K&L. *See* A50-51, 54, 63, 87-88, 304 n.3, 447 n.7.; R23 at 6 n.2, 15 (Savage Brief in K&L Appeal). Proof of such collusion would support, among various other arguments, K&L's defense that the Proceeds Assignment violates public policy. *See* A488. *If* the DC Court accepts that defense, the consequences could include, *inter alia*, exclusion of evidence relating to the Proceeds Assignment, limitation of Mandl's damages, and/or the dismissal of Mandl's claims.

KL Brief filed in Second Circuit Court of Appeals, Docket No. 10-2257, Doc. 96 at 26- 27.

Based upon KL's admitted concrete and particularized and actual and imminent injury, KL has standing to appear and be heard in opposition to all relief sought in this Motion.

i. KL has Article III Standing

KL has standing under Article III of the U.S. Constitution before the Bankruptcy Court on this Motion because the entry of the Settlement Agreement Order and entry of an order authorizing and sanctioning the Representative's interest in the DC Proceeds creates "concrete and particularized" and "actual or imminent" injury to KL that could fairly be traced to the granting of the relief sought in this Motion. *Lundy v. Hockberg*, 91 F. App'x 739, 742 (3d Cir. 2003).

The Supreme Court has identified three requirements for Article III standing. First, the plaintiff must allege that he or she has suffered or imminently will suffer an injury. Second, the plaintiff must allege that the injury is fairly traceable to the defendant's conduct. Third, the plaintiff must allege that a favorable federal court decision is likely to redress the injury. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997).

When examining standing, the Supreme Court determined that the essence of an Article III standing inquiry is whether: the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness

which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501(1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. (citations omitted). *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 (1978).

When analyzing whether the injuries at issue in an appeal satisfied the Article III standing requirements, the Court in *Duke* said

> For purposes of the present inquiry, we need not determine whether all the putative injuries identified by the District Court…are sufficiently concrete to satisfy constitutional requirements [citations omitted]. It is enough that several of the "immediate" adverse effects were found to harm appellees.
>
> ********
>
> Where a party *champions his own rights*, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.

438 U.S. at 73, 74-75, 80-81 (emphasis added).

The Duke case makes clear that (a) once a party identifies injury that is "distinct and palpable," it must then (b) demonstrate that the injury is "fairly traceable" by demonstrating a "but for" causal connection between the claimed injury and the challenged conduct. See also *Young v. Klutznick*, et.al., 652 F.2d 617, 630 (6th Cir. 1981) ("In [Duke Power], the Court express the "but for" causation standard for standing purposes in the following terms: Whether 'there is a "substantial likelihood' that the relief requested will redress the injury claimed.'(citations omitted). In other words, if there is a "substantial likelihood" that an injury would not occur without the challenged conduct, standing causation exists")

1. Injury

An injury-in-fact necessary to support standing may be economic or noneconomic

in nature. *See Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 152 (1970). Either type of injury must satisfy the requirement of being actual or imminent. This means that the injury must have already been inflicted or must be likely to occur imminently. This also means that the threatened injury must be sufficiently probable. *Pennell v. San Jose*, 485 U.S. 1, 8 (1992); *Hargrave v. Vermont*, 340 F.3d 27, 33-34 (2d Cir. 2003).

Contingent liability may constitute an injury that is sufficiently actual or imminent for standing purposes, even though actual liability may not arise for some time or at all. For example, in *Clinton v. City of New York,* 524 U.S. 417, 430-431 (1998), New York was held to have suffered an immediate concrete injury the moment President Clinton vetoed a provision in a bill that would have relieved New York State from liability for up to $2.6 billion in health care related taxes owed to the federal government, because the City could, at some point in the future, be assessed by the State for part of the State's tax liability if the line-item veto were upheld.

In connection with the Representative's appeal of the Cross-Motion, KL alleged that the Settlement Agreement, and the potential sanctioning of the DC Proceeds provision, has, could and would cause KL injury, which injury is economic, non-economic, contingent and particularized, immediate and concrete. KL Brief filed in Second Circuit Court of Appeals, Docket No. 10-2257, Doc. 96 at 26- 27.

Moreover, to address and resolve KL's admitted injury, KL has spent legal fees to obtain mediation communications, claims its inability to conduct discovery in the D.C. Action is extremely prejudicial to KL, and, while the risk of being sued by Mandl for malpractice existed even if Mandl had not settled with Savage, KL acknowledges that the injury that is *unique to the D.C. Proceeds* is the risk of inflated damages against KL in the DC Action. KL Brief filed in Second Circuit Court of Appeals, Docket No. 10-2257, Doc. 96 at 26- 27.

KL intends to seek, in the DC Action, an order voiding the DC Proceeds provision under D.C. law. By admitting that it intends to seek such relief in the DC Action, this Court may infer that 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 the identical issues in the D.C. state courts. *See United Black Fund, Inc. v. D.C.*, No. 03ca9568, 2004 D.C. Super Lexis 20, at *6-7 (D.C. Super.Ct. Nov. 9, 2004)**.**

2. Causal Connection

KL admits in connection with the relief sought in this Motion that it has suffered economic, non-economic and contingent injury, which was imminent at the time of approval of the Settlement Agreement, would not have occurred "*but for*" granting of the relief sought in this Motion in connection with the DC Proceeds, and which injury KL could have avoid if it objects to and defeats this Motion. *Duke*, 438 U.S. at 73, 74-75, 80-81 (injury is "fairly traceable" by demonstrating a "but for" causal connection between the claimed injury and the challenged conduct).

3. Redressibility

Redressibility, under an Article III analysis, does not contemplate that KL would have to be successful in its objection to this Motion. It only contemplates that if KL is successful in defeating this Motion, the injury it has suffered would have been redressed. See *Hirsch v. Arthur Andersen*, 72 F.3d 1085, 1091 (2d Cir. 1995). In sum, merely by appearing and arguing against this Motion, KL satisfies Article III redressibility requirements.

ii. Prudential Standing

Prudential standing refers to the requirement that even"[w]hen the plaintiff has alleged injury sufficient to meet the 'case or controversy ' requirement,…the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." [citation omitted] *Decision,* 417 B.R. at 210 citing *Warth v. Seldin,* 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Here, KL would be appearing on this Motion with respect to its own legal rights and interests and, thus, would satisfy the prudential standing requirements.

iii. Party-in-Interest Standing

The Second Circuit Decision set forth the parameters of party-in-interest standing under 11 U.S.C. § 1109.

> Section 1109 provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." *See* 11 U.S.C. § 1109. Beyond this non-exhaustive list, the term "party in interest" is not further defined in the statute. *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir. 1983). "The general theory behind the section is that anyone holding a direct financial stake in the outcome of the case should have an opportunity . . . to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest." Alan Resnick & Henry J Sommer, Collier on Bankruptcy ¶ 1109.01 (16th ed. 2011); *accord FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 284 (7th Cir. 2002); *In re Alpex Computer Corp.*, 71 F.3d 353, 357 (10th Cir.1995); *In re Hutchinson*, 5 F.3d 750, 756 (4th Cir. 1993). However, courts have long recognized that the meaning of the term "must be determined on an '*ad hoc*' basis," and the categories mentioned in Section 1109 are "not meant to exclude other types of interested parties from the purview of that section." *In re Johns-Manville Corp.*, 36 B.R. 743, 747, 748 (Bankr. S.D.N.Y.1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985); *accord In re Martin Paint Stores*, 207 B.R. 57, 61 (S.D.N.Y. 1997) ("The term 'party in interest' is broadly interpreted, but not infinitely expansive."); *see also In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1989)(Section 1109(b) is not exclusive in its listing of parties in interest, but "if a party is not affected by the reorganization process it should not be considered a party in interest").
>
> Although parties in interest typically have a financial stake in the outcome of the litigation, under certain limited circumstances, courts have recognized that a party with a legal (as opposed to financial) interest may appear. *See, e.g.*, *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 5 (1st Cir. 1999) (individual creditor may maintain adversary proceeding against trustee for alleged breach of duty); *In re Brady*, 101 F.3d 1165, 1170-71 (6th Cir. 1996)(trustee acts as a party in interest in seeking extension of time to object to dischargeability of a debt on behalf of creditors); *In re Co Petro Mktg. Grp., Inc.*, 680 F.2d 566, 572 (9th Cir. 1982) (regulatory agency with supervisory responsibilities over the debtor's business or financial affairs); *In re Overview Equities, Inc.*, 240 B.R. 683, 686-87 (Bankr. E.D.N.Y. 1999) (party with legal interest in property, rather than claim, found to be a party in interest).
>
> Whether or not someone is a party in interest must be read against the purposes of Chapter 11, which are to "preserv[e] going concerns and maximiz[e] property available to satisfy creditors," *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453(1999) (citation omitted). Thus, any construction of the term "party in interest" must be mindful of the fact that Chapter 11 is structured the way that it is because Congress believed that "creditors and equity security holders are very often better judges of the debtor's economic viability and their own economic self-interest than courts, trustees, or [governmental agencies such as] the SEC," *id.* at 458 n.28, and that is why Chapter 11 allows the intervention of third parties in limited circumstances, such as in the case of parties in interest. Although "party in interest" must be interpreted in terms of the specific provision in which it appears, *see In re Refco Inc.*, 505 F.3d at 116 n.9 (2d

> Cir. 2007) (noting that "party in interest" may have different meanings in different portions of the bankruptcy code), other rights afforded "parties in interest" throughout the bankruptcy code are instructive. These include: (1) the right to request the appointment of a trustee or examiner under Section 1104(a) and (b); (2) the right to request termination of a trustee's appointment under Section 1105; (3) the right to request conversion of a chapter 11 case to a case under an alternate chapter pursuant to Section 1112(b); (4) the right to file a plan under Section 1121(c); (5) the right to object to confirmation of a plan under Section 1128(b); and (6) the right to request a revocation of an order of confirmation under Section 1144.

Second Circuit Decision, 2011 U.S. App. LEXIS 9451, *17-22.

While this Court and the Second Circuit held that KL did not have standing in connection with the 9019 Motion, finding that KL had no financial stake in the 9019 Motion and was only a "debtor of a debtor", (Decision, 417 B.R. at 211, Second Circuit Decision, 2011 U.S. App LEXIS 9451, at *22-23), KL is implicated in this Motion as the Court is now being asked to decide fate of the Representative rights in the DC Proceeds, thus, directly impacting KL's ability to try to void the DC Proceeds, reduce its potential liability and even void the entire DC Action.

And while this Court cited *Integrated Solutions, Inc. v. Serv. Support Specialties, Inc.*, 193 B.R. 722, 726 (D.N.J. 1996), *aff'd,* 124 F.3d 487 (3d Cir. 1997) in support of the proposition that a creditor had no standing to challenge an order approving sale and assignment of a cause of action because "any financial exposure [was] contingent upon [the plaintiff] prevailing in the litigation," Decision, 417 B.R. at 211, *citing Integrated*, 193 B.R. at 726, this ruling is distinguishable from the case at bar.

First, the aforementioned *Integrated* decision *analyzed "appellate" standing*[7], not standing under 11 U.S.C. §1109, which is the relevant standard before this Court. Second, the *Integrated* Court held that the subject defendant, indeed, had standing before the court on whether the subject tort claim transferred violated public policy and applicable bankruptcy and state law. *Integrated*, 193 B.R. 726-727.

[7] Because the question presented to the Court was whether the subject defendant had waived his right to the argument made before the *Integrated* court because the defendant never ***appealed*** the bankruptcy court order. It was a matter of fact in the case that the subject defendant had appeared before the bankruptcy court, was granted standing, and its argument rejected by the bankruptcy court.

Inasmuch as KL intends to bring a motion in the DC Action (1) alleging the very same "case or controversy" (2) alleging injury, causation and redressibility, and (3) implicating the same facts, transactions, issues and parties as identified in this Motion, KL must, *ipso facto*, have standing before this Court on this Motion.

g. Res Judicata and Collateral Estoppel attach to any order entered on this Motion as the Transactions, Facts and Evidence Essential to this Motion are Essential to the D.C. Action In Connection to the Purported Assignment of the DC Proceeds and the Issue regarding the Representative's rights in the DC Proceeds has now been "actually litigated"

SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1463 (2d Cir. 1996), *overruling, Shapiro v. Cantor*, 123 F.3d 717 (2d Cir. 1997) provides that for *res judicata* to attach, it is not enough that the two suits at issue have the same parties, similar or overlapping facts, and similar legal issues," *First Jersey*, 101 F.3d at 1463, but that, "[a] first judgment will generally have a preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, where the same evidence is needed to support both claims, and where the facts essential to the second were present in the first. If the second litigation involved different transactions … there generally is no claim preclusion." 101 F.3d at 1464 (quotations and citations omitted).

The doctrine of res judicata, or claim preclusion, simply means that when a judgment is rendered on the merits, it bars a second suit between the same parties or their privies based on the same cause of action or claims. *See Cieszkowska v. Gray Line N.Y.*, 295 F.3d 204, 205 (2d Cir. 2002);

Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. Collateral estoppel applies if each of the following elements are met: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously

litigated was necessary to support a valid and final judgment on the merits. *NLRB v. Thalbo Corp*., 171 F.3d 102, 109 (2d Cir. 1999).

Here, the common issue in this Motion and the D.C. Action is whether the Representative's interest in the DC Proceeds obtained under the Settlement Agreement may be voided under applicable state and federal law. The same series of transactions (namely, the execution and approval of the Settlement Agreement and the role the DC Proceeds assignment plays in the DC Action) are relevant to addressing this issue in both this Motion and the D.C. Action, and the evidence needed to litigate this issue in both forums and the facts essential to D.C. Action are also present in this Motion. The issue of the Representative's rights in the DC Proceeds will be actually litigated and decided by this Motion and this litigated issue is necessary to support a valid and final judgment on the merits.

A ruling by this Court that the DC Proceeds provision is binding on the Representative, Mandl and KL under applicable bankruptcy and/or New York Law enjoins KL from using a motion to void the DC Proceeds provision as a stepping stone to void the DC Action. This factor is crucial because if the situation comes down to two (2) competing orders (i.e. this Court's and the DC Court's), one sanctioning the DC Proceeds provision (i.e. the federal court) and one voiding it (i.e. the DC Court), the attainment by the Representative of a federal court order sanctioning the DC Proceeds provision is a pyrrhic victory if KL will be able to undermine this order via a competing state court order on the same exact facts, transactions, issues and parties, thus impairing the Representative's right to property of Teligent's estate to the extent Mandl nonetheless obtains a settlement/judgment *on the merits* of the DC Action.

Further, unlike this Court's ruling in the Decision, KL has standing to appear and be heard on this Motion under 11 U.S.C. §1109 and Article III of the U.S. Constitution, has had a full and fair opportunity to be heard, and is, thus, bound by any order entered by this Court on this Motion. *See* **Point III(f)** herein.

Based upon the foregoing, *res judicata* and collateral estoppel attaches to an order entered by this Court on this Motion.

h. Where State and Federal Court Orders Collide, Federal Preemption is Mandated

When the order of one court interferes with the authority of another to dispose of a res within its custody/jurisdiction, the federal court order and law preempts conflicting state law and any potential or existing orders arising out of that conflicting law. *In re Watts and Sachs*, 190 U.S. 1, 30 (1903); *Landau v. Vallen,* 895 F.2d 888, 894 (2d Cir. 1990). Because the Bankruptcy Court has exclusive jurisdiction over the DC Proceeds as property of Teligent's estate, and approved a Settlement Agreement and, for purposes of this discussion, this Motion, in which Savage is entitled to be paid the DC Proceeds, a determination by the DC Court under DC law denying Savage a right to the DC Proceeds under both bankruptcy law and New York law (as expressly set forth in the Settlement Agreement) would set up a direct conflict between a federal court order and law and a state court order both of which Mandl could not satisfy. Moreover, because the Bankruptcy Court not only has exclusive jurisdiction over the *assets* of Teligent's estate recovered by Savage pursuant to Sections 541(a)(3) and (4) and 550, but also has exclusive *jurisdiction* to interpret and enforce its own orders, (*Am. Booksellers Assoc. v. Houghton Mifflin*, No. 94-CV-8566 (JFK), 1998 U.S. Dist. LEXIS 4341, at *8-9 (S.D.N.Y Apr. 2, 1998) and 28 U.S.C. §§157 and 1334), any argument that the DC Superior Court has authority to entertain a collateral attack by KL on an order entered on this Motion, has no basis.

[P]reemption will be inferred where the state law "actually conflicts with the federal law." *(citation omitted).* Such a conflict arises where it is physically impossible to comply with both the federal and state law or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 51 (1st Cir. 1991) *cert.den.* 502 U.S. 1082, 112 S.Ct. 993, 117 L.Ed.2d 154 (1992). Here, Mandl could be a party to two conflicting orders - one state and one federal, with the inability to comply with one without violating the other. As such, preemption is clearly mandated.

i. The Exceptions to the Anti-Injunction Act and the All Writs Act Apply

Under the Anti-Injunction Act, 28 U.S.C. §2283, federal courts are prohibited from issuing injunctions against state court actions except under limited circumstances, including: (i) an express authorization from Congress; (ii) where necessary in aid of the Court's jurisdiction or; (iii) to protect or effectuate the federal courts' judgments.

The All Writs Act, 28 U.S.C. §1651(a), authorizes federal courts to "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 All Writs 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.' This power is not limited to parties in the original action,…but rather 'extends, under appropriate circumstances, to persons who...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.'" *Hillman v. Webley*, 115 F.3d 1461, 1468 (10th Cir. 1997) (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977)). *See also ONBANCorp., Inc. v. Holtzman*, No. 96-CV-1700, 1997 U.S. Dist. LEXIS 9502, at *13 (N.D.N.Y. June 27, 1997) ("Orders under the All Writs Act may be directed to non-parties if necessary to prevent frustration of the court's orders.") (citing *New York Tel. Co.*, 434 U.S. at 174), *aff'd*, 1997 U.S. App. LEXIS 28453 (2d Cir. Oct.9, 1997)).

Accordingly, whether KL is a "party" or not does not impact the Court's authority to issue an injunction under the Anti-Injunction Act or the All Writs Act.

i. The Anti-Injunction Act

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). *See also Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 (2d Cir.

2000). 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). 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 and any order entered by this Court on this Motion, is prohibited.

In light of the foregoing, it is respectfully submitted that the Bankruptcy Court is duty-bound to determine, by operation of law, that an order entered on this Motion and the Settlement Agreement lawful and binding in all respects. As such, the neither the Settlement Agreement, Settlement Agreement Order or an order entered on this Motion may be collaterally attacked. *Travelers Indemnity Co. v. Bailey,* 557 U.S. --, 129 S. Ct. 2195, 2203 (2009); *Celotex Corp v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995).

1. Express Authorization

Section 105(a) of the Bankruptcy Code constitutes the necessary "express authorization" to issue a court order enjoining state court proceedings. *In re Si Yeon Park*, 198 B.R. 956, 966-67 (Bankr. C.D. Cal. 1976); *In re Neuman*, 71 B.R. 567, 571 (S.D.N.Y. 1987). Section 105(a) of the Bankruptcy Code provides:

> (a) The 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.

The "basic purpose" of §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." *Si Yeon Park*, 198 B.R. at 967 (internal citation omitted); *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567, 571 (S.D.N.Y. 1987).

While the policy underlying the Anti-Injunction Act is the desire to avoid disharmony between federal and state systems, certain exceptions reflect congressional recognition that injunctions may sometimes be necessary in order to avoid disharmony. *U.S. Home Corp. v. Los Prados Community Assoc., Inc. (In re U.S.H. Corp.)*, 280 B.R. 330, 338 (Bankr. S.D.N.Y. 2002). Section 105 is an "expressly authorized" exception to the Act and authorizes bankruptcy courts to enjoin state court proceedings under proper circumstances. *Id.*

As Collier observes, "the basic purpose of the section [§105] is to enable the court to do whatever is necessary to aid its jurisdiction, i.e. anything arising in or relating to a bankruptcy case." (citation omitted). *In fact section 105(a) contemplates injunctive relief in precisely those instances where parties are "pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate.*" *Manville Corp. v. Equity Sec. Holders Comm. (In re Johns-Manville Corp.)*, 801 F.2d 60, 63 (2d Cir. 1986). *Id.* at 339. (emphasis added).

Accordingly, where a state court might change the effect of a bankruptcy court order, and where such a decision would be "directly at odds with the Bankruptcy Court's determination" and would "create uncertainty among the estate's creditors and require even more procedural maneuverings to correct inconsistencies in the two rulings," it is appropriate to issue an injunction to enjoin any conflicting state court proceedings. *In re Neuman*, 71 B.R. 567, 574 (S.D.N.Y. 1987).

The Representative details the need to issue an injunction to protect the Bankruptcy Court's order entered under FRBP 9019 and Sections 541(a)(3) and (4) and the Representative's right to enforce the Order under FRBP 7069 and Section 541 of the Bankruptcy Code. Furthermore, as highlighted in *Integrated* and its progeny, the Bankruptcy Court has exclusive jurisdiction over property of the estate under Section 541(a)(3) and (4) and 28 U.S.C. §§157 and 1334.

Orders entered under Section 105 have been used to enforce orders entered under FRBP 9019 and 7069, Section 541(a)(3) and (4) and 28 U.S.C. 157 and 1334. *See e.g. Celotex Corp v.*

Edwards, 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995), *on remand, sub nomine*, 56 F.3d 24 (5th Cir. Tx. 1995) (Sections 157 and 1334); Brickell *v. Dunn (In re Brickell)*, 142 F. App'x 385, 389 (11th Cir. 2005) (FRCP 69); *In re Joint E. & S. Dist. Asbestos Litig.,* 129 B.R. 710, 861 (E.D.N.Y. 1991), *supra.* (Rule 9019); *In re Am. Family Enters*., 256 B.R. 377, 405 (D.N.J. 2000) (Rule 9019); *In re Allen-Main Assocs. Ltd. Pshp.*, 233 B.R. 631, 634-35 (D. Ct. 1999) (FRCP 69); *Exec. Risk Indem., Inc. v. Brooks (In re Jackson Brook Inst., Inc.)*, 280 B.R. 779, 785 (D. Me. 2002) (FRCP 69); *In re Tessmer*, 329 B.R. 776 (Bankr. M.D. Ga. 2005) (Section 541); *Balanoff v. Glazier (In re Steffan)*, 97 B.R. 741 (Bankr. N.D.N.Y. 1989) (Section 541).

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." 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 Anti-Injunction 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.

Section 105(a) contemplates injunctive relief in precisely those instances where parties are "pursuing actions pending in other courts that threaten the integrity of the bankrupt's estate." *Manville Corporation v. Equity Security Holders Committee (In re Johns-Manville Corp.)*, 801 F.2d 60, 63 (2d Cir. 1986). Under Section 105, a bankruptcy court has the power to stay proceedings in other courts, including state courts, when the court is satisfied that such proceedings would defeat or impair its jurisdiction over the case before it. *C&J Clark America, Inc. v. Carol Roth, Inc.*, (*In re Wingspread Corp.*), 92 B.R. 87, 92 (Bankr.S.D.N.Y 1988). The bankruptcy court may enjoin state proceedings at any point in time from the institution of the state court proceedings to its closure. *Hill v. Martin,* 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed. 293 (1935).

Moreover, as the Adversary Proceeding is a core proceeding that arises in or under Title 11, pursuant to 28 U.S.C. § 157, a bankruptcy judge is empowered to hear and determine the proceeding, issue final orders and judgments, and has ancillary core jurisdiction to enjoin the DC Action in order to protect or effectuate any judgments and/or orders entered in the Adversary Proceeding over which it originally had jurisdiction and/or over which it retains exclusive jurisdiction. *Williams v. Stefan (In re L&S Industries)*, 122 B.R. 987, 991 (Bankr. N.D. Ill. 1991) *aff'd* 989 F.2d 929 (7th Cir. 1993).

In finding no independent jurisdiction necessary for jurisdiction over a state court action, the U.S. Supreme Court stated that,

> A federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court….to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well-settled…The proceeding being ancillary and dependent, the jurisdiction of the court follows from that of the original cause.

Local Loan Co. v. Hunt, 292 U.S. 234, 239, 78 L.Ed. 1230, 54 S.Ct. 695 (1934).

Where, as here, 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).

In its Decision, this 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." Decision, 417 B.R. at 213 citing *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). The Representative has identified a multitude of Bankruptcy Code sections and rules justifying imposition of an injunction under 11 U.S.C. § 105(a).

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.

Here, the Court entered a judgment in the Adversary Proceeding finding a fraudulent conveyance was made to Mandl under 28 U.S.C. §§ 157(b)(2)(H) and 11 U.S.C. § 548, authorized the Representative to seek recovery of the value thereof under 11 U.S.C. § 550 and preserved Mandl's assets under 11 U.S.C. §551; the Settlement Agreement Order approving the

terms of the Settlement Agreement was approved pursuant to a motion filed and heard by this Court pursuant to 28 U.S.C. § 157 and FRBP 9019 and the entry of the Settlement Agreement Order created an enforceable contract under New York law, applicable bankruptcy law and the recent U.S. Supreme Court decision in *Travelers,* 557 U.S. --, 129 S. Ct. 2195, 2203-04, 174 L.Ed.2d 99 (2009), both with respect to the Settlement Agreement and the Settlement Agreement Order; the Representative's right to recover Mandl's assets under the Settlement Agreement, including its equitable interest in the DC Proceeds, constitutes property of Teligent's estate under 11 U.S.C. § 541; the Representative's rights under the Settlement Agreement and Settlement Agreement Order may be enforced under 11 U.S.C. §§ 542, 544, 550, 551 and FRBP 7069 and 7070; this Court retains exclusive jurisdiction over the Adversary Proceeding, the Settlement Agreement and Settlement Agreement Order, any order entered on this Motion, and property of Teligent's estate pursuant to 28 U.S.C. §§157 and 1334 and pursuant to the express provisions of the Plan and the Settlement Agreement as approved by the Settlement Agreement Order.

2. Relitigation Exception

The Anti-Injunction Act's authorization of a federal court injunction "to protect or effectuate its judgments" is known as the "relitigation" exception. The relitigation exception "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

In the case at bar, the Bankruptcy Court entered the Settlement Agreement Order approving all terms of the Settlement Agreement and creating a valid, binding, 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 Corp. v. Ins. Co. of N. Am.*, 807 F. Supp. 1143, 1153 (S.D.N.Y. 1992). Moreover, where a party asserts claims in a state 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, 248-49 (2d Cir. 1961).

Moreover, once this Court renders an order with respect to the enforcement of the DC Proceeds provision of the Settlement Agreement, the relitigation exception will apply. *Canady v. Allstate Ins. Co*., 282 F.3d 1005, 1015 (8th Cir. 2002) (citing *NBA v. Minn. Prof. Basketball, Ltd. P'ship*, 56 F.3d 866, 872 (8th Cir. 1995) ("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.'") (citation omitted)); *accord Smith v. Woosley*, 399 F.3d 428, 435 (2d Cir. 2005).

3. Necessary in aid of its jurisdiction

When analyzing the "necessary in aid of its jurisdiction" exception, the basis for an injunction exists "[when] particular property is before the district court… such as when it is the subject of an *in rem* proceeding or in the custody of a bankruptcy trustee[.]" *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1103 (11th Cir. 2004).

Here, because Savage's right to the DC Proceeds renders such proceeds property of the estate pursuant to 11 U.S.C. §541(a)[8] over which the Bankruptcy Court has exclusive jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334, the Settlement Agreement, the Settlement Agreement Order and the Plan, imposition of an injunction to protect this right is mandated. *See* **Point III(b)(iii)** hereinabove.

Further, 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 Decision, the gauntlet has been thrown down by KL, creating the very real specter of a conflict of orders and laws between, (1) on the

[8] The enforcement rights under FRCP 69 against identified property constitute an *in rem* proceeding for purposes of obtaining an order under the exceptions to the Anti-Injunction Act. *See Bobak Sausage Co. v. Bobak Orland Park, Inc.*, No. 06-C-4747(MFK), 2008 U.S. Dist. LEXIS 89182, at *17 (N.D. Ill Nov. 3, 2008).

one hand, the Representative's right to enforce, and Mandl's obligation to comply, with the Judgment, Settlement Agreement and Settlement Agreement Order, and, (2) on the other hand, Mandl's potential obligation to comply with a conflicting state court order voiding the DC Proceeds and prohibiting or authorizing him to fail to deliver the DC Proceeds to the Representative which will impair property of Teligent's estate and be harmful to Teligent's creditors.

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.

As this Court has exclusive jurisdiction over the Settlement Agreement, Settlement Agreement Order and property of Teligent's estate, the imposition of an injunction against KL and/or the DC Court to address the Representative's rights in the DC Proceeds is required "in aid of this Court's jurisdiction."

ii. All Writs Act

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).

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, the Adversary Proceeding or has standing to be heard on this Motion, the Bankruptcy Court has the authority under the All Writs Act and the Anti-Injunction Act, and under Section 105(a), *U.S. v. International Brotherhood of Teamsters, et.al.*, 266 F.3d 45, 50 (2d Cir. 2001), 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 and/or an order entered on this Motion. *Id.* ("Here, on the other hand, the district court has sought not to bind appellants to the consent decree, but to enjoin them from acts that would frustrate the consent decree's operation on parties that are bound to the decree.)

"It is well settled that the courts of the United States have the inherent and statutory (28 U.S.C. § 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with by force, guile, or otherwise." *Mei Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 404 (S.D.N.Y. 2004) (citations and quotations omitted), *amended on other grounds*, 2004 U.S. Dist. LEXIS 10931 (S.D.N.Y. June 10, 2004).

The All Writs 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.' This power is not limited to parties in the original action,…but rather 'extends, under appropriate circumstances, to persons who...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.'"

Hillman v. Webley, 115 F.3d 1461, 1468 (10th Cir. 1997) (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977)).

In *Hillman*, the court explained that where a state court action threatens to undermine a settlement authorized by a federal court (in the context of a complex class action suit), federal courts typically utilize the All Writs Act in one of two ways: First, some federal courts, relying on their jurisdiction over the original class action suit and the class members, have utilized the Act to issue orders in the class action enjoining class members from pursuing state court actions that would conflict with the settlement order. *See White v. Nat'l Football League*, 41 F.3d 402, 409 (8th Cir. 1994); *see also In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985). Second, some courts have utilized the Act to "remove" actions from state court to federal court, and to subsequently bar litigation of the removed action. *See In re VMS Sec. Litig.*, 103 F.3d 1317, 1323-26 (7th Cir. 1996); *Hillman*, 115 F.3d at 1468.

Accordingly, where a court has entered an order approving an agreement reflecting a choice of law provision, as this Court has done with the so-ordered Settlement Agreement, 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). An attempt by a non-party to do so justifies the imposition of an injunction. *Id.* Moreover, the entry of an order by the DC Court declaring the Representative's interests in the DC Proceeds void would frustrate or totally impair the Representative's ability to enforce a court-ordered stipulation and collect property of the estate (i.e. the D.C. Proceeds), thus justifying the imposition of an injunction against KL and/or the DC Court.

IV. Conclusion

Based upon the foregoing, the Representative respectfully requests that the Court enter an order directing:

i. that the unambiguous Settlement Agreement and Settlement Agreement Order are binding on the Representative and Mandl, without regard to the entry of any conflicting orders by the DC Court;

ii. that applicable bankruptcy law and New York law are applicable to the Representative's rights in the DC Proceeds;

iii. that, under New York law and applicable bankruptcy law, the Representative received an equitable assignment of the DC Proceeds, which assignment and the future rights in the DC Proceeds constitute property of Teligent's estate over which this Court has exclusive jurisdiction under 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. §541;

iv. that KL is hereby stayed, pursuant to 11 U.S.C. § 362, from taking any act in the DC Action or any other court that would seek to void the Representative's right in and to the equitable assignment of the DC Proceeds and the right to collect thereon, to the extent a judgment or settlement is approved in the DC Action in an amount in excess of $0;

v. that KL is hereby enjoined pursuant to 28 U.S.C. §§ 1651 and 2283, from taking act in the DC Action or any other court that would seek to void the Representative's right to the equitable assignment of the DC Proceeds and the right to collect thereon, to the extent a judgment or settlement is approved in the DC Action in an amount in excess of $0; and

vi. that KL is hereby enjoined pursuant to 28 U.S.C. §§ 1651 and 2283 from obtaining from any Mediation participant, or inquiring about, any Mediation Communications, which such communications shall include all communications relating to the Mediation for the period commencing with Mandl and the Representative's initial contact with the Mediator commencing March 1, 2008

and terminating on June 6, 2008, the date on which the Mediator's Report was filed with this Court;

vii. that KL is hereby enjoined pursuant to 28 U.S.C. §§ 1651 and 2283 from seeking an order of the DC Court in connection with, or respect to, the enforcement, interpretation or impairment of the Mediation Orders or in connection with the production of or inquiry relating to any and all Mediation Communications;

viii. this Court hereby retains exclusive jurisdiction over the Settlement Agreement, Settlement Agreement Order, the Mediation Orders, the order entered on this Motion, and property of Teligent's estate; and

ix. for such other and further relief as may be just and proper.

Dated: Croton on Hudson, New York
May 27, 2011

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