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Hearing Date: May 12, 2009 @ 10:00 a.m.
Objection Deadline: May 6, 2009 @ 5:00 p.m.
Reply Deadline: May 11, 2009 @ 5:00 p.m.

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

In re	**Chapter 11**
TELIGENT SERVICES, INC.	**Case No. 01-12974 (SMB)** **(Substantively Consolidated)**
SAVAGE & ASSOCIATES, P.C. as the Unsecured Claims Estate Representative for and on behalf of TELIGENT, INC., ET AL.	**Adv. Pro. No. 03-2523**
Plaintiff,	
- against –	
ALEX MANDL,	
Defendant.	

UNSECURED CLAIMS ESTATE REPRESENTATIVE'S (I) *OBJECTION* TO K&L GATES MOTION TO LIFT MEDIATION CONFIDENTIALITY RESTRICTIONS AND (II) APPLICATION IN SUPPORT OF REPRESENTATIVE'S *CROSS-MOTION* TO (A) ENFORCE COURT'S MEDIATION ORDER AND GENERAL ORDER 143 (B) DIRECT TURNOVER OF APPLICABLE DOCUMENTS (C) IMPOSE MONETARY SANCTIONS AGAINST HALL LAMB AND HALL, P.A, WILLIAMS & CONNELLY, LLP AND K&L GATES, LLP AND (D) ENJOIN K&L GATES FROM SEEKING TO COLLATERALLY ATTACK THE ORDER APPROVING THE SETTLEMENT AGREEMENT AND TO VOID TERMS OF THE SETTLEMENT AGREEMENT

Savage & Associates, P.C. ("**SA**" or "**Representative**"), the appointed Unsecured Claims Estate Representative of Teligent, Inc., files this (I) *Objection* (the "**Objection**") to K&L Gates application and motion (the "**Motion**") seeking an order lifting the mediation confidentiality restrictions set forth in this Courts Order Directing Mandatory Mediation (the "**Mediation Order,**" Docket No. 01-12974, Doc No. 1806) and the General Order 117

Governing Mediation, as amended by M-211 and M-143 (collectively, the "**General Order**") and (II) files this *Cross-Motion* seeking (a) to enforce the Mediation Order and General Order (b) direct turnover of applicable documents (c) impose monetary sanctions against Hall Lamb Hall ("**HLH**"), Williams & Connelly ("**WC**") and K&L Gates ("**KL**") and (d) enjoin KL from seeking to collaterally attack this Court's order approving the settlement agreement and to void certain terms of the settlement agreement (the "**Cross-Motion"**), and respectfully sets forth and represents:

PRELIMINARY STATEMENT

KL's Motion, seeking to suspend the confidentiality provisions of the Mediation Order, is a preliminary step to its ultimate and disclosed objective: the filing of motion in the pending state court malpractice action that Mandl commenced against KL (the "**KL Action**") to void a provision in the Settlement Agreement (the "**Settlement Agreement**") entered in this adversary proceeding pursuant to which Mandl agreed to file the KL Action and, pursuant to the Settlement Agreement (Section 3.3), to pay to the Representative 50% of the net proceeds of any settlement or judgment from the KL Action. As this Court knows, the Settlement Agreement was approved by an order of this Court (the "**Settlement Agreement Order**"). Thus, KL, who was served with the motion to approve the Settlement Agreement (the "**9019 Motion**") and failed to appear as a party in interest to object to the 9019 Motion, now seeks to effectively void the Settlement Agreement and, by extension, the Settlement Agreement Order via the KL Action pending in state court in the District of Columbia.

The relief sought in the Motion is extensive. The Motion, without citing any caselaw in support of its request for relief, seeks an order of this Court eviscerating the confidentiality protections set forth in the Mediation Order and General Order of this Court. KL seeks not only

to depose the parties and attorneys present at the Mediation II (defined below), but also seeks to depose the appointed Mediator, Erwin Katz, Esq. without citing any precedent for this request. Instead, KL alleges that the Representative has failed to articulate a basis to justify continued confidentiality, disregarding the multitude of caselaw, statutes and public policy explaining the important reasons for maintaining confidentiality of all alternative dispute resolution proceedings.

Ultimately, a review of the Motion and exhibits thereto reflects that KL can obtain the information it seeks regarding the issues set forth in the Motion by questioning witnesses without regard to what took place during the Mediation, as discussed more fully below.

For the reasons set forth below, the Representative asserts that KL has failed to articulate any basis acceptable under applicable law and public policy justifying a suspension of confidentiality of the Mediations.

Because of KL's predatory objective to collaterally attack and void provisions of a Federal Court order (i.e. the Settlement Agreement Order) in the state court where the KL Action is pending, and, in light of KL, WC and HLH's violation of the Mediation Order and the General Order, the Representative files its Cross-Motion to *inter alia* (a) enforce the Settlement Agreement Order, (b) enjoin KL from seeking to void or otherwise undo the provisions of the Settlement Agreement approved by the Settlement Agreement Order, and (c) impose sanctions against KL, WC and HLH for violating the Mediation Order and General Order.

APPLICABLE FACTUAL BACKGROUND

1. In September 2002, the Representative was the appointed Unsecured Claims Estate Representative of Teligent, Inc ("**Teligent**") pursuant to Teligent's confirmed Chapter 11 Plan of Reorganization ("**Plan,**" Docket No. 01-12974, Doc. 1211). Under the Plan, the

Representative is vested with, among other things, the right to commence adversary proceedings arising under Chapter 5 of Title 11 of the United States Code.

2. In April 2003, the Representative commenced approximately 1000 adversary proceedings (the "**Adversary Proceedings**") against various defendants, including Alex Mandl (the "**Mandl**" together with the Representative, the "**Parties**"), the former president and CEO of Teligent, seeking recovery of certain alleged preferential, improper post-petition and fraudulent transfers (the "**Mandl Adversary Proceeding**").

3. In connection with and governing all Adversary Proceedings, this Court entered the Mediation Order which, in addition to compelling, *inter alia*, mandatory mediation in the Adversary Proceedings, provides in relevant part that:

> Any statements made by the Mediator, by the Parties, or by others during the mediation process should not be divulged by any of the participants in the meditation (or their agents) or by the mediator to the court or to any third party **SMB 2/3/04 unless otherwise ordered by the court**. 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. *See* the ADR General Order, section 5.1, January 17, 1995.

In re: Teligent, Inc., Et. Al., No. 01-12974 (SMB), Order Approving Mediation Procedures and Appointing a Mediator at 9, 17 (Bankr. S.D.N.Y. February 3, 2004) (emphasis in original) (Ex. 4 to Motion).

4. In addition to the Mediation Order, a standing order of the Bankruptcy Court (i.e. the General Order) applicable to all court-ordered mediation proceedings which provides that:

> 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.

S.D.N.Y. LBR General Order M-143, *Court Annexed Mediation Program: Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings,* ¶5.1-2 (January 17, 1995) (Ex. 3 to Motion).

5. Pursuant to the Mediation Order, the Parties participated in two rounds of mediation. The first round of mediation took place in the summer of 2004 (the "**Mediation I**"). At this time, Mandl was represented by KL Gates (f/k/a Kirkpatrick & Lockhart)("**KL**").

6. On April 23, 2007, a Trial was held in the Mandl Adversary Proceeding. On January 3, 2008, this Court entered a decision awarding the Representative judgment against Mandl in the sum of $12,040,000.00. A judgment (the "**Judgment**") was entered thereafter by the Court (Ex. 8 to Motion).

7. After entry of the Judgment, Mandl, still represented by KL, filed a slew of 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 discovered on a former Teligent employee's computer (the "**New Trial Motion**").

8. In connection with the New Trial Motion, Judith Sturtz Karp, a former partner at KL, filed an affidavit in support of the New Trial Motion stating that she repeatedly asked the Representative for a copy of the board minutes. Also in connection with the New Trial Motion, (in addition to Mandl's post-trial memoranda of law and pretrial summary judgment motion), KL stated under FRCP 11 and in affidavits filed by Mandl that Mandl did not resign from Teligent but was, instead, terminated for other than cause.

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

10. On April 10, 2008, KL filed a motion to be relieved as Mandl's counsel. This motion by

granted by entry of an order by this Court on April 28, 2008.

11. After KL withdrew as Mandl's counsel, in addition to continuing the post-judgment motion practice, GT, on Mandl's behalf, and the Representative decided to engage in mediation again ("**Mediation II**, together with the Mediation I, the **"Meditations**"). Prior to the commencement of the Mediation II, Mandl acknowledged a malpractice claim against KL as one of his most significant assets. As such, Mandl's new counsel, GT, invited KL to participate in the Mediation to achieve a global resolution. KL declined to participate in the Mediation II but was aware of the malpractice claim Mandl intended to assert against KL.

12. Prior to the commencement of the Mediation II, the Representative commenced an action in the state court in Virginia against Mandl (the "**Mandl State Court Action**"), Susan Mandl and a company known as ASM (co-owned by Mandl and Susan Mandl until 2004 and wholly owned by Susan Mandl thereafter), seeking recovery of assets transferred by Mandl to both Susan Mandl and ASM.

13. The Mediation II commenced in or about March 2008 and continued through the execution of Settlement Agreement (Ex. 1 to Motion) and filing of the 9019 Motion June 6, 2008. Docket No. 03-2523, Doc. No. 220)(Ex. 12 to Motion).

14. During the pendency of the Mediation II, the Representative reviewed documents received from Mandl in connection with the enforcement of the Judgment. A document produced led the Representative to believe that KL failed to produce all documents prior to trial that it had in its possession in connection with its representation of Mandl at the time of his separation.[1]

[1] As the Court may recall, the Representative served KL with a subpoena prior to trial seeking production of all documents in their files relating to its representation of Mandl during his separation from Teligent. In letters to the Representative and in papers filed with the Court, KL denied having any responsive documents in its possession and served no privilege log. Docket No. 03-2523, Doc. No. 83. After the filing of motions to compel compliance by KL with the subpoena, KL finally claimed it found only two (2) drafts of the Separation Agreement, which the Court directed they turnover to the Representative. At the hearing on the motion to compel, the Representative insisted that there must be other documents in KL's file. Judy Karp and Robert Michaelson both denied that any other

After e-mailing Robert Michaelson and demanding the turnover of all documents in his possession, Mr. Michaelson admitted that KL had additional documents in its possession and delivered, among other things, correspondence between Stacy Dees and Thomas Cooney, Esq. (a partner at KL), reflecting that contrary to KL"s statements set forth in affidavits filed by KL partners in the New Trial Motion that KL was unaware of Stacy Dees as a potential witness, KL was well aware of Stacy Dees' existence.[2]

15. Upon filing the 9019 Motion, in addition to serving over 1800 of Teligent's creditors, Robert Michaelson, Esq., a partner at KL, was electronically served with the 9019 Motion. See **Exhibit B** hereto.

16. No objections to the Motion were filed and the 9019 Motion and Settlement Agreement were approved by the Court via the entry of the Settlement Agreement Order entered on July 30, 2008 (Docket No. 03-2523, Doc. No. 222)(Ex. 13 to Motion).

17. Under the Settlement Agreement, Mandl was to pay a total of $6.005 million to the Representative. In order to pay this substantial sum, Mandl liquidated his own stock and pension holdings and Susan Mandl and ASM sold millions of dollars in Gemalto options, which the Representative contended in the Mandl State Court Action were fraudulently transferred by Mandl to Susan Mandl and/or ASM, to help satisfy Mandl's monetary obligations under the Settlement Agreement. *See Ex. 15 to Motion at 2.*[3]

18. Part and parcel of the payments due from Mandl to the Representative under the Settlement

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documents were found and Judy Karp filed an affidavit with the Court stating this was the case. *See Hearing Transcripts*, Docket No. 03-2523. Doc. Nos. 90 and 95.

[2] A review of the e-mails between Ms Savage and Mr. Michaelson (annexed hereto as **Exhibit A**), reflects that Mr. Michaelson continued to withhold other responsive documents from the Representative.

[3] Accordingly, contrary to KL's allegations in the Motion that neither Susan Mandl nor ASM provided consideration for the dismissal of the Mandl State Court Action (Motion at 15), ASM (a privately held company previously co-owned by Mandl and Susan Mandl until Mandl transferred his interest in ASM to Susan Mandl in 2004) and Susan Mandl utilized the Gemalto stock in ASM's possession to satisfy Mandl's monetary obligations under the Settlement Agreement

Agreement is Mandl's obligation to remit to the Representative 50% of the proceeds (net of fees, costs and expenses) obtained by Mandl via the resolution of a professional malpractice action against KL. Settlement Agreement at 15, Section 3.3.

19. Pursuant to the Settlement Agreement, Mandl commenced a professional malpractice action against KL in the Superior Court in Washington, D.C. (i.e. the KL Action). Upon information and belief, pursuant to an answer filed by KL in the KL Action and comments made by KL's counsel in its motion papers, KL contends that Mandl's obligation to pay to the Representative an amount equal to 50% of the net proceeds from a judgment or settlement of the KL Action constitutes an improper assignment of the malpractice claim against KL. Even though KL admits in its Motion that neither New York nor District of Columbia law prohibit the assignment of a malpractice action.[4] Furthermore, upon information and belief, one of the defenses to be raised by KL in the KL Action is that Mandl actually resigned without good cause from Teligent, contrary to the multitude of filings made by KL under FRCP 11 and the many Mandl affidavits filed by KL with the Court.

20. Upon information and belief, discovery commenced in the KL Action and KL's counsel, WC, served Mandl's counsel, HLH, with a document demand. In conjunction with responding to this demand, upon information and belief, HLH produced documents related to and drafted, during the Mediation I (the "**Mediation I Documents**")(during which KL represented Mandl), and during the Mediation II (the "**Mediation II Documents**"), the mediation during which KL no longer served as counsel to Mandl.

[4] The Motion fails to disclose which state law applies to this argument. However, one may infer that KL believes that New York and/or District of Columbia law are applicable given the reference to these states' laws and given the alleged tortuous conduct (malpractice) took place in D.C. and N.Y. In fact, District of Columbia law evinces a policy of free assign ability of claims. In general, all contractual rights may be assigned, including the right to sue for enforcement of a claim. The right to assign is presumed, based upon principles of unhampered transferability of property rights and of business convenience. *Antal's Restaurant, Inc. v. Lumberman's Mutual Casualty Co*., 680 A.2d 1386 (D.C. 1996).

21. In addition to the exchange of other discovery, Mandl and KL deposed Denise Savage on January 7, 2009. During Ms. Savage's deposition, Andy Hall, Esq. of HLH, handed Ms. Savage an e-mail between Susan Mandl and Judy Karp[5] dated in or around October 2004 in which Susan Mandl asked Judy Karp if she asked for a copy of board minutes from the Representative. Ms. Karp responded that she asked for a copy of the board minutes in discovery, but stated did not want to ask for the board minutes anymore because she wasn't certain what the board minutes would say. This e-mail exchange contradicts Judy Karp's affidavit filed in support of the New Trial Motion in which she stated under penalty of perjury that she repeatedly demanded a copy of board minutes from the Representative claiming the Representative's employees claimed they could not locate any board minutes.[6]

22. Also during Ms. Savage's Deposition, Mr. Hall questioned Ms. Savage about the events that took place and documents drafted during the Mediation I. Ms. Savage, though willing to answer questions regarding Mediation I because KL had participated in Mediation I, nevertheless objected to the questions and the use of documents from Mediation I to the extent that either Mandl or KL intended to introduce any evidence (documentary or testimony) relating to the Mediation I at the trial (or in any interceding motions) in the KL Action and demanded that such questions and answers be reflected under seal in the deposition transcript in light of the entered Mediation Order by this Court and prevailing General Orders entered in the United States Bankruptcy Court for the Southern District of New York.

[5] Ms. Savage is in possession of this e-mail and is prepared to produce it to the court at the hearing on the Motion and Cross-Motion.

[6] As a reminder, as set forth in the Representative's objection filed to the New Trial Motion, and as demonstrated in documentary evidence annexed to and affidavits filed in support of the objection, KL *never* requested a copy of any board minutes from the Representative in connection with this Adversary Proceeding. While KL served a broad discovery request (which did not detail a request for board minutes), the Representative filed a timely objection to the production request alleging it was vague, overbroad and burdensome. KL never moved to enforce their

23. With respect to questions regarding the Mediation II, Ms. Savage refused to answer any such questions in light of the fact that KL did not participate in Mediation II. Moreover, upon learning from HLH that HLH had produced documents to WC related to and drafted during the Mediation II, Ms. Savage objected to the use of any such documents during any deposition, motion or trial relating to the KL Action in light of the entered Mediation Order and General Orders of the USBC for the SDNY.

24. In light of Mandl and WC's apparent intention to utilize the Mediation I and Mediation II documents during depositions and in the KL Action and to question witnesses present at the Mediation I and the Mediation II, Savage's counsel, on January 8, 2009, Jacques Semmelman, Esq., sent a written demand (the "**Savage Letter,**" Ex. 16 to Motion) to WC and HLH demanding that HLH demand from WC the return of all Mediation II related documents and that they cease and desist from questioning witnesses regarding the Mediation I and Mediation II and from utilizing such information in the KL Action.

25. On January 30, 2009, WC sent a letter (the "**WC Letter**," Ex.17 to Motion) responding to the Savage Letter in which WC contended, *inter alia*, that Mandl had violated the Mediation Order by turning over the Mediation Documents, implied that its retention of the Mediation Document did, thus, not violate the Mediation Order, that WC intended to move for relief from the Mediation Order, that the onus is on the Representative to identify the documents WC has in its possession that constitute documents from the Mediation II (though the Representative is not a party to the KL Action and has no information as to the exact documents in WC's possession, other than drafts of the Settlement Agreement), and that WC has no intention of returning any Mediation Documents to Mandl's counsel absent a further order of this Court.

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production request.

26. The WC Letter stated in relevant part that:

> Any alleged violation of the Bankruptcy Court's orders was that of Mr. Mandl. It is our view, however, that all documents related to the 2004 and 2008 mediations are essential to the fair litigation of Mr. Mandl's claims against KL Gates LLP. All communications between, on the one hand, Mr. Mandl and his counsel, and, on the other hand, Ms. Savage and/or her counsel are central to a number of issues in the litigation including but not limited to Mr. Mandl's failure to appeal the judgment against him, Mr. Mandl's failure to mitigate his alleged damages, and the Mandl-Savage agreement to collude in a lawsuit against KL. Therefore, we will seek relief in the Bankruptcy Court, including a request that the Court lift any requirement of confidentiality as to the 2004 and 2008 mediations, and that it enter an order making it clear that no order from the Bankruptcy Court obstructs full discovery and use in this litigation and of all documents and information relating to the mediations.

27. Regardless of WC's asserted need for the Mediation Documents, the Representative asserts that KL, having been counsel to Mandl at the time the Mediation Order was entered, is and was on actual notice of the entry of the Mediation Order and is clearly in violation of the Mediation Order and General Order by refusing to return Mediation Documents in its possession. Moreover, though Savage, at her deposition, specifically stated that all documents relating to the Mediation II were entirely confidential pursuant to the Mediation Order and the General Order of this Court and could not be disclosed to KL (given KL was not a party to nor counsel of record during the Mediation II),WC failed to initiate notice to Savage of its possession of documents relating to Mediation II and, but for Savage's inquiry of HLH as to whether Mediation II Documents were turned over to WC, WC's possession of the documents may never have been made known to Savage and WC could have introduced Mediation II Documents at the KL Action trial unbeknownst to the Representative.

28. Furthermore, a review of documents annexed to the Motion reflect that the information WC seeks can be obtained without regard to what transpired during the Mediation II, as more

fully set forth below.

29. Based upon the foregoing and the argument set forth below, the Representative objects to the WC Motion and respectfully requests that this Court enter and order denying the WC Motion and grant its Application seeking to enforce the terms of the Mediation Order and General Orders of this Court and direct WC and KL to: (a) deliver any and all Mediation Documents to Mandl's counsel; (b) certify to this Court that all Mediation Documents have been returned to Mandl's counsel and (c) preclude WC and Mandl from deposing any person with respect to the Mediation I and Mediation II and preclude the introduction of any testimony or evidence arising from and relating to the Mediation I and II in the KL Action or any other action.

30. SA further seeks entry of an order granting the relief sought in the Cross-Motion, as more fully set forth below.

REPRESENTATIVE'S <u>OBJECTION</u> TO KL'S MOTION TO SUSPEND CONFIDENTIALITY PROVISIONS

<u>ARGUMENT</u>

(I) KL can obtain information they seek without invading the Sanctity of Mediation

KL argues that the confidentiality provisions Mediation Order and the General Order should be lifted in order to allow KL to obtain evidence in connection with the KL Acton in support of the following:

a. issues of causation, mitigation and damages, specifically addressing why Mandl chose to settle than pursue his post-trial motions

b. valuation of the settlement

c. the fundamental question of whether Mandl's alleged assignment of proceeds to the Representative from a KL judgment or settlement violates public policy

d. why Mandl failed to settle for a lesser amount or different consideration and whether he did so for reasons unrelated to his assessment regarding his potential exposure during the Adversary Proceeding

e. KL's allegations of settlement by duress

f. whether dismissal of the Mandl State Court Action and release of claims against Ms. Mandl and ASM drove the settlement and its terms

g. Why the Representative surrendered claims against Ms. Mandl and ASM

Each of the foregoing issues can be resolved with information from witnesses that do not require an invasion of the confidentiality of the Mediation II, as set forth below.

A. Mandl's analysis and thought processes as to his confidence in his post-trial motions have nothing to do with what transpired during the Mediation II. Instead, this information is contained in Mandl's private thought processes and conversations with his counsel. Without regard to Mandl's thought processes, an objective review of the New Trial Motion and facts discovered since it filing: (a) what we now know is a false affidavit filed by Judy Karp (in which Karp stated that she repeatedly demanded a copy of the Board Minutes, in contraction of the e-mail exchange between Ms. Karp and Ms. Mandl in which Ms. Karp's admitted decision to stop looking for the Board Minutes, and in which she claimed she did not know who Stacy Dees was or that she existed prior to the trial (b) the documents produced in April 2008 (one year after the trial (*See* **Exhibit A** hereto) which disclose correspondence to Stacy Dees in 2001 with annexed drafts of the Settlement Agreement), (c) the fact that Mandl and KL knew of the existence for years of a Board Meeting and the participants in that meeting and failed to disclose them to the Representative prior to the entry of this Court's post-trial Decision or call a single witness at trial, other than Mandl, at trial, and (d) KL's failure to cross-examine any of the Representative's witnesses at trial, provides the fodder required to understand why Mandl chose to settle the Mandl Adversary Proceeding instead of pursuing the New Trial Motion. Furthermore, considering the pendency of the Representative's Motion for Reconsideration in which the Representative sought to increase the Judgment from $12 million to upwards of $24 million (arising from the interest rate information being contained in the Employment Agreement at issue, which had to be read by the Court in conjunction with the Promissory Notes), any additional information, if any, to be derived from the Mediation II would provide no additional disclosures as to the risks Mandl faced in connection with pursuing the post-trial motions and an appeal of the Judgment.

B. The valuation of the settlement can also be resolved without invading the confidentiality of the mediation. The valuations were prepared by each party's respective counsel. These processes were not shared during the mediation. Instead each counsel undertook an analysis to arrive at the settlement value. This information, if not otherwise privileged, could be obtained from the parties without regard to what transpired at the

Mediation II.[7]

C. The allegation of whether there was an assignment against public policy is a non-starter. Putting aside the Representative's position that there was no such assignment, KL admits in the Motion that neither New York nor the District of Columbia have laws against the assignment of a malpractice claims. While they may hope to establish a precedent on this issue, no such laws prohibiting assignment existed at the time of the approval of the Settlement Agreement. Thus, this argument has no legal basis on which to proceed.[8]

D. Mandl's reasons for settling and the reasons underlying the amount that he agreed to settle at were never disclosed during the Mediation. This information can be obtained through Mandl's testimony as to his thought processes, analysis of risks and his conversations with counsel. While the Representative is bound not to disclose what took place at the Mediations, the Representative can say what did not occur; namely, that Mandl was not threatened with criminal penalties, investigation by the IRS or any other governmental agency, contrary to allusions made by KL in the Motion. The threat to Mandl during the Mediation II was the same that existed prior to the Mediation II, namely, that the Representative had the right to enforce a judgment against all of Mandl's assets (and those fraudulently transferred by Mandl to Ms. Mandl and ASM) and his risk of being entirely wiped out financially. No threat other than loss of his financial security was made or at risk.[9]

E. The Representative can safely represent that Mandl's risk of not settling was the possibility that he would be financially ruined. While Mandl may have had other reasons for settling that were undisclosed to the Representative, no such information was disclosed during the mediation and no threats of criminal liability or IRS investigations were made at all.

F. If the Mandl State Court Action against Ms. Mandl and ASM calculated into Mandl's decision to settle, that was something not discussed nor disclosed during the Mediation. This information can only be obtained by deposing Mr. and Ms. Mandl and

[7] The Representative argues below that KL should be enjoined from making such an argument in the KL Action in any event because KL failed to appear and object to the 9019 Motion and arguments arising under the Supremacy Clause and other applicable federal law.

[8] The Representative argues below that KL should also be enjoined from making such an argument in the KL Action given its failure to appear and object to the 9019 Motion and arguments arising under the Supremacy Clause and other applicable federal law.

[9] KL attaches as Exhibit 18 to the Motion handwritten notes, dated February 28, 2008, by an unidentified author. In connection with a referenced conference which Ms. Savage *did not* take part in, the notes state that "Denise blackmail jail plus IRS." As a preliminary issue, the Representative wants to take this opportunity to state that NO threats regarding criminal liability or IRS investigations were ever expressed by the Representative or Ms. Savage nor were any such statements authorized by the Representative to be made by any agent of the Representative. The Representative has never utilized threats of this nature in any settlement negotiation nor does it condone such threats, acknowledging the clear obligation to comply with the rules of professional conduct. Secondarily, given the notes are *dated three weeks prior* to the commencement of the Mediation II (i.e. February 28, 2008), witnesses may be questioned about the notes without invading any mediation confidentiality because the notes predate the commencement of the Mediation.

seeking their private thought processes, discussions with each other or with their counsel.

G. As for why the Representative surrendered claims against Ms. Mandl and ASM, KL need only see that ASM and Ms. Mandl liquidated a large portion of the asset that the Representative sought in the Mandl State Court Action (i.e. the Gemalto Options) to pay money due under the Settlement Agreement. Furthermore, if KL wants to know the Representative's thought processes as to why it dismissed the action against Ms. Mandl and ASM, they need only ask as nothing that transpired during the Mediation II need be disclosed to address the answer to this question.

Based upon the foregoing, KL has failed to establish any basis to invade the sanctity of the mediation process.

(II) Under relevant orders of the Bankruptcy Court, all Mediation Documents are confidential and privileged

It is respectfully submitted that, pursuant to Bankruptcy Rule 9019 of the Federal Rules of Bankruptcy Procedure, Local Bankruptcy Rule 9019-1 ("**L.R. 9019-1**") of the Local Rules of the United States Bankruptcy Court for the Southern District of New York, the terms of the Mediation Order and General Order (collectively, the "**Orders**"), all documents and conversations created in relation to the Mediations and conversations that took place therein are confidential and may not be disclosed by any party.

Local Rule 9019, Alternative Dispute Resolution, provides that,

> Alternative dispute resolution shall be conducted in the manner required by any applicable standing order of the Court.

The Comment to Local Rule 9019 states in relevant part,

> Procedures governing mediation programs in bankruptcy cases and adversary proceedings are governed by General Order M-143 and any amendments or supplemental standing orders of the Court.

Section 5.0 of General Order M-143 governs confidentiality and provides in relevant part that:

> 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 by 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-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 possible settlement of a dispute;
> B. Admissions made by the other party in the court of the mediation proceedings;
> C. Proposals made or views expressed by the mediator.

The plain language of the Mediation Order and the General Order make clear that all statements made during mediation, which includes all documents prepared in connection with the Mediation, are protected from disclosure.

(III) Under Applicable Federal law, it is respectfully requested that the Court not grant an exception to its orders regarding the confidentiality of mediation proceedings

It is respectfully submitted that the Bankruptcy Court should not permit a suspension of the confidentiality requirements of the Mediation Order and General Order (a) because such an exception would conflict with confidentiality requirements of the Alternative Dispute Resolution Act of 1998 ("ADRA"), 28 U.S.C. § 651, and (b) because this case does not provide an appropriate case for the exercise of the Bankruptcy Court's discretion to deviate from its rules. The merits of these arguments are discussed below.

a. ADRA

Removing confidentiality protections governing the Mediations would conflict with ADRA's confidentiality provision. Under ADRA, Congress provided for the confidentiality of mediation proceedings, as follows:

> (d) Confidentiality Provisions.— Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071 (a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

28 U.S.C. § 652; *see also* Fed. R. Bankr. P. 9018 (granting Bankruptcy courts the authority to make "any order which justice requires (1) to protect the estate ...in respect of … confidential research"); S.D.N.Y. R. 83.12(k) (adopting confidentiality provisions for mediation on September 30, 1999). While confidentiality is, thus, provided without exception, the act does not define the scope of the confidentiality afforded, and it leaves the enforcement of confidentiality to local courts.[10] *See* 28 U.S.C. § 652(d).

1. *The "Compelling Need" Exception*

KL argues that the Bankruptcy Court should make an exception to the confidentiality order in this case because discovery related to the mediation proceedings is "essential" for KL to develop defenses including allegations of duress, collusion.

Courts require more than a showing of relevance for third parties to obtain discovery of confidential ADR proceedings; the party seeking the information must show that its need for the

[10] Courts may exercise this authority by sanctioning or disqualifying attorneys or mediators. *Fields-D'Arpino v. Restaurant Associates, Inc.,* 39 F. Supp. 2d 412, 418 (S.D.N.Y. 1999) (disqualifying a lawyer who acted as a mediator between the parties from subsequently serving as counsel of record for the defendant and precluding the parties from initiating any discovery with respect to the mediation); *see also Bernard v. Galen Group*, 901 F. Supp. 778, 784 (S.D.N.Y. 1995) (sanctioning an attorney for disclosing settlement offers received in confidential mediation, prior to the enactment of ADRA).

information outweighs the privacy interests involved. *See Fireman's Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, et. al., 03-CV-0531 (DLI)(MLO), 03-CV-1625 (DLI)(MLO), 2005 U.S. Dist. LEXIS 32116, *12 (E.D.N.Y. June 28, 2005); *see also In re Anonymous*, 283 F.3d 627, 637 (4th Cir. 2002) (disallowing disclosure of statements made during mediation unless "manifest injustice" will result from non-disclosure); *Hasbrouck v. BankAmerica Housing Services*, 187 F.R.D. 453, 456 (N.D.N.Y. 1999) (noting that "extraordinary circumstances or compelling need" must be shown "for modification of a previous confidentiality order that has been relied upon by the parties…"), *aff'd* 190 F.RD. 42 (N.D.N.Y. 1999). In balancing these interests in the context of evidence sought for the purposes of impeaching a witness's credibility, other evidence on the record may obviate the need for disclosure of confidential materials. *Hasbrouck* at 461 (applying the balancing test to determine whether to grant a protective order).

The Representative has a strong privacy interest justifying continued confidentiality of the Mediations. First, the Mediation II Documents would likely not exist were it not for the confidentiality provisions of the mediation proceedings. Allowing KL to obtain discovery of the materials would penalize the Representative for relying on the Court's rules and orders.

Second, to the extent KL contends that it needs to obtain discovery of the mediation proceedings to show the Representative's alleged bias or whether facts exist to establish a basis for KL to argue that an improper assignment took place, the final settlement agreement approved by the Court is the *sine qua non* of the parties agreements, not the draft settlement agreements nor any other documents or statements made during the Mediation II. The Settlement Agreement reflects Teligent's financial interest in the outcome in the Adversary Proceeding.

Third, KL is able to locate testimony and documents it requires without invading the

sanctity of the Mediations.

2. The Fraud Exception

While KL appears to argue that the Court should make an exception to the confidentiality of the mediation proceedings by arguing that the Parties engaged in some kind of misconduct resulting in collusion or duress resulting in Mr. Mandl's failure to appeal the judgment against him, Mr. Mandl's failure to mitigate his alleged damages, and the Mandl-Savage agreement to collude in a lawsuit against KL, KL fails to cite a single case in support of this proposition.

Ultimately, a review of the caselaw reflects KL is misguided in seeking the suspension of confidentiality provisions in connection with its allegations of collusion.

First, as stated above, other than promising to enforce the Judgment against Mandl's assets, no threats were made by the Representative to Mandl. As for allegations of collusion, the Settlement Agreement speaks to the Representative's role as a mere witness in the KL Action. The Representative has no other role in that litigation, does not confer with Mandl or his counsel in connection with Ms. Savage's testimony and has not in any manner discussed or resolved the manner in which Ms. Savage would respond to questions asked during a deposition or at trial. Accordingly, arguments of misconduct, duress and collusion are specious and melodramatic.

Second, while Courts have interpreted the ADRA to permit parties to reveal misconduct by the opposing party or mediator in the course of the mediation, *see, e.g., Fisher v. SmithKline Beecham Corp.,* No. 07-CV-0347A(F), 2008 WL 4501860, *5 (W.D.N.Y. September 29, 2008) (finding that plaintiff's disclosure to the court of defendant's "token" settlement offer did not violate the court's ADR plan where it was necessary to establish defendant's lack of good faith), *rec.den.*, 2009 WL 899433 (W.D.N.Y. 2009); *Deluca v. Allied Domecq Quick Service*

Restaurants, No. 03-CV-5142 (JFB)(AKT), 2006 WL 2713944, *2 (E.D.N.Y. 2006); *F.D.I.C. v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999) (denying plaintiff's motion to strike defendants' affidavits concerning threats of criminal prosecution made by plaintiffs in court-ordered confidential mediation proceedings), all of these cases arise in subsequent litigation between the parties to the mediation, and they all concern allegations about the alleged misconduct of the opposing party. *See Fisher* at *1-*3, *5; *Deluca* at *1-*2; *F.D.I.C* at 736. Given that KL was not a party to the Mediation, KL may not rely on these cases to obtain an exception to the confidentiality order.

(b). *General Order*

Any exception to the mediation procedure would require an exception to the General Order. Unless an exception is granted, the General Order, an adjunct to FRBP 9019 and Local Rule 9019-1, binds the Court and the parties before it. 28 U.S.C. § 2071(a) (noting that "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business," and outlining rule-making procedures); Fed. R. Bankr. P. 9029(a) ("A district court may authorize the bankruptcy judges of the district, subject to … the requirements of [Fed. R. Civ. P. 83], to make and amend rules of practice and procedure which are consistent with—but not duplicative of—Acts of Congress and these rules…"); *Sears, Roebuck & Co. v. Spivey*, 265 B.R. 357, 372 (E.D.N.Y. 2001) ("The local rules [of bankruptcy courts] have the force of law to the extent that they do not conflict with higher authority."); *In the matter of Local Bankruptcy Rules* (S.D.N.Y. December 1, 1994) (stating that the Bankruptcy Judges of the Southern District are "authorized, subject to the requirements of [Fed. R. Civ. P. 83], to make and amend rules of practice and procedure."), available at http://www.nysb.uscourts.gov/orders/m140.pdf; S.D.N.Y. LBR 1000-1(b)(1) ("The Local

Bankruptcy Rules shall apply to all cases in this district governed by the Bankruptcy Code."); *Id.* at 1001-1 cmt. 1 (noting that the Bankruptcy Court "may issue standing orders to supplement these Local Bankruptcy Rules..."); *see also* Fed. R. Civ. P. 83 (outlining rule-making procedures for District Courts). As noted above, the General Order prohibits parties to mediation from disclosing statements made in mediation. See S.D.N.Y. LBR General Order M-143, at ¶5.1; *see also* Fed. R. Evid. 408.

The Bankruptcy Court may, in the exercise of discretion, authorize a deviation from local bankruptcy rules in a particular case. *Stern v. Bambu Sales, Inc. (In re Spielfogel)*, 237 B.R. 555, 561 (E.D.N.Y. 1999) (indicating that Bankruptcy Courts' "inherent discretion to depart from the letter of the Local Rules extends to every Local Rule regardless of whether a particular Local Rule specifically grants the judge the power to deviate from the Rule."); *In re Weinstein*, 245 B.R. 188, 191 (Bankr. E.D.N.Y. 2000); *see also Somlyo v. J. Lu-Rob Enterprises, Inc*., 932 F.2d 1043, 1048-49 (2d Cir.1991) ("The district court's inherent discretion to depart from the letter of the Local Rules extends to every Local Rule regardless of whether a particular Local Rule specifically grants that judge the power to deviate from the rule."); *Hines v. Hines (In re Hines),* 193 Fed. Appx. 391, 393. 396-7 (B.A.P. 6th Cir. 2006) (reviewing a Bankruptcy Court's deviation from local rules under an abuse of discretion standard). Fairness governs this exercise of discretion, and "the determination of fairness may include, but is not limited to consideration of the facts of the case, the content and goals of the local rules, the legal precedent on analogous issues, and the letter and legislative intent of any relevant statute." *Somylo* at 1049; *see also Elsasser v. Bank of Am. Corp.*, No. 1:07-CV-1187 (LEK), 2008 U.S. Dist. LEXIS 34188, *4 (N.D.N.Y. Apr. 24, 2008) (applying the *Somylo* fairness standard to determine whether a Bankruptcy Court abused its discretion in accepting responsive pleadings one day after the

deadline for submission).

The *Somylo f*actors weigh against deviating the from Mediation Order and the General Order in this case. First, "the facts of the case" show that the Representative has maintained the confidentiality of the mediation proceedings, and was, in fact, injured by Mandl's breach thereof, compelling the filing of this Objection and Cross-Motion. This argument is supplemented by the Representative's interests elaborated in the "compelling need" analysis.

Second, "the content and goals" of the General Order appear to be the promotion of confidential mediation as a form of alternative dispute resolution ("ADR"). As discussed herein, enforcing the confidentiality provisions of the General Order promotes those ends. Third, "the Legal Precedent on analogous issues" indicates, at minimum, that a party seeking confidential information from ADR proceedings must show a compelling need. *See Fireman's Fund* at *12 (noting that in order to discover the details of a confidential settlement agreement, a plaintiff must show that the need for the information is compelling enough to outweigh the privacy interests involved and indicating that the same confidentiality considerations apply to different types of "judicially encouraged ADR in which confidentiality was contracted for and expected.").

Finally, "the letter and legislative intent" of ADRA provide little guidance under the circumstances. As noted above, ADRA provides for confidentiality in general terms, but it leaves enforcement to local courts. Similarly, the legislative history of the confidentiality provision is limited to one statement, "The bill also provides for the confidentiality of the alternative dispute resolution process and prohibits the disclosure of such confidential communications." 144 Cong. Rec. H10457, 8 (October 10, 1998) (statement of Rep. Coble).

The cases are legion in this district and others that prohibit disclosure of statements and

documents from mediation. *See In re Anonymous,* 283 F.3d 627 (4th Cir. 2002); *Calka v. Kucker Kraus & Bruh*, 167 F.3d 144 (2d Cir. 1999); *Irwin Seating Company v. Int'l Business Machines Corp.* 2007 U.S.Dist. LEXIS 10472 (W.D.Mich.2007); *Deluca v. Allied Domeco Quick Service Restaurants*, 2006 U.S. Dist. LEXIS 68328 (E.D.N.Y. 2006); *Concerned Citizens of Belle Haven v. The Belle Haven Club*, 2002 U.S.Dist. LEXIS 26117 (D.Conn.2002); *Habrouck v. Bankamerica Housing Services,* 187 F.R.D. 453 (N.D.N.Y.1999); *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d 1164 (C.D.Ca. 1998) *aff'd* 216 F.3d 1082 (9th Cir. 2000); *Bernard v. Galen Group*, 901 F.Supp. 778 (S.D.N.Y. 1995). *See also O.V. Gray, Protecting the Confidentiality of Communications in Mediation*, 1998, www.ohlj.ca/archive/articles/36_4_**gray**.pdf ; Laufgraben, *Protecting Mediation Communications in Federal Courts*, http://www.acctm.org/docs/Protecting%20Mediation%20Communications%20in%20Federal%20Courts%20_CONNOR-Laufgraben_%20Update.pdf.

KL has failed to show a single compelling reason to justify invading the sanctity of the Mediation II. This is especially apparent given (a) the Settlement Agreement speaks for the agreement between the Parties and renders irrelevant prior drafts or negotiations between the Parties (b) information regarding issues raised by KL can be obtained from witnesses and need not implicate any of the discussions or documents that from the Mediation II and (c) KL is improperly seeking to collaterally attack the Settlement Agreement and Settlement Agreement Order in violation of federal law and without regard to having no existing basis in state law to do so.

(IV) Public policy considerations favor maintaining the confidentiality of the Mediation

Public policy considerations favor maintaining the confidentiality of the Mediation. In

deciding whether and how to enforce confidentiality provisions in mediation proceedings, courts regularly look to the public policy considerations implicated. *See, e.g., Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d. Cir. 1979) *cert den.,* 444 U.S. 1076, 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980); *Fireman's Fund* at *10-12. Protecting the confidentiality of mediation proceedings serves three important policy purposes.

First, protecting confidentiality provisions promotes the use of ADR as a cost-effective, flexible alternative to litigation in overburdened courts. Ensuring that parties to ADR proceedings receive the treatment promised by the courts as well as opposing parties is critical to the perception and reality of fairness in these proceedings. If courts do not uphold confidentiality provisions, there will be a "chilling effect" on ADR proceedings. *Fireman's Fund* at *10-12; *Fields-D'Arpino*, 39 F. Supp. 2d at 417-8; *See also Calka,* 167 F.3d 144*; Bernard*, 901 F.Supp 778.

Second, protecting confidentiality promotes the effectiveness of ADR in promoting settlements between the parties. As the U.S. Court of Appeals for Second Circuit wrote:

> If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of [the] program…

Lake Utopia at 930; *Bernard v. Galen Group*, 901 F. Supp. 778, 783-4 (S.D.N.Y. 1995) (quoting *Lake Utopia*); Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. on Disp. Resol. 239, 245 (2002) ("Encouraging forthright participation in [mediation] is analogous to the rationale for privileges that protect confidentiality … between attorney and client, priest and penitent, or doctor and patient. Confidentiality is deemed essential

in order to enable a quality of communication that would otherwise not take place.")

Third, enforcing confidentiality in prior mediation proceedings protects courts from the appearance of bias. As Professor Ellen Deason explained:

> Confidentiality also serves an institutional purpose by safeguarding the neutrality of adjudication in a court that may hear a dispute arising out of a mediation. Evidentiary rules and court confidentiality policies for mediation communications deter parties from trying to use these communications to their advantage and protect the court from the perception of bias that could accompany that use.

Deason at 247. Thus, protecting the confidentiality of mediation proceedings protects the reputation of courts as well as mediation proceedings.

(V) Request for Relief

Based upon the foregoing, the Representative respectfully requests that this Court (i) deny the Motion *in toto* and (ii) direct HLH, WC and KL to cease and desist from asking any questions in depositions or at the KL Action trial relating to the Mediation I and II (iii) direct HLH, WC and KL from introducing any documents at the KL Action trial relating to and/or prepared in connection with the Mediation I and Mediation II and (iv) direct the turnover of any Mediation II Documents in KL's and WC's possession be returned to HLH.

REPRESENTATIVE'S CROSS-MOTION TO COMPEL COMPLIANCE WITH COURT ORDERS, TO ENJOIN KL FROM SEEKING TO VOID PROVISIONS OF THE SETTLEMENT AGREEMENT AND SETTLEMENT AGREEMENT ORDER AND FOR SANCTIONS IN CONNECTION WITH VIOLATION OF COURT ORDERS[11]

PRELIMINARY STATEMENT

By this Cross-Motion, the Representative seeks an order from this Court (a) compelling compliance with the Mediation Order, General Order and Settlement Agreement Order (b) enjoining KL from seeking to collaterally attack the Settlement Agreement Order and void

provisions of the Settlement Agreement and (c) for the imposition of monetary sanctions against HLH, WC and KL for violating the Mediation Order and the General Order.

As discussed hereinabove, KL (a) seeks to suspend the confidentiality provisions of the Mediation Order and the General Order (b) has admitted that it intends to seek a ruling from the state court in the KL Action determining whether the provision of the Settlement Agreement (Section 3.3), compelling Mandl to remit to the Representative the value of 50% of the net proceeds Mandl obtains in the KL Action by judgment or settlement, constitutes an improper assignment of a malpractice action under New York and/or District of Columbia law, and (c) along with WC and HLH, admits that it violated the Mediation Order and General Order by (i) HLH delivering to WC and KL Mediation II Documents and (ii) WC and KL reviewing and failing to immediately return the Mediation II Documents when demanded by the Representative.

For the reasons set forth below, the Representative respectfully requests that the Cross-Motion be granted.

ARGUMENT

(I) KL Should be Enjoined from Seeking to Void Provisions of the Settlement Agreement and Settlement Agreement Order

(a) KL Failed to Object to the 9019 Motion, there is and was no basis in applicable state law to object to the 9019 Motion, thus, KL is Estopped from Seeking to Relitigate it in State Court

On June 6, 2008, the Representative filed the 9019 Motion with the Court in both the Adversary Proceeding docket and Teligent's main Bankruptcy docket (i.e. 01-12974 (smb))(the "**Main Docket**"). In addition to the over 1800 Teligent creditors who received service of the 9019 Motion, all parties who either filed documents in the Teligent's Main Docket or filed a

[11] The facts set forth in the above entitled section "Applicable Factual Background" are incorporated by reference in

notice of appearance and request for documents received electronic notice of the filing of the 9019 Motion.

One of the individuals who received electronic notice of the 9019 Motion was Robert Michaelson, Esq., a partner at KL and one of Mandl's former attorneys in the Adversary Proceeding. *See a copy of the electronic notice* annexed hereto and made a part hereof as **Exhibit B**.

On July 30, 2008, this Court entered the Settlement Agreement Order in which it was recited that no objections had been filed to the 9019 Motion. Docket No. 03-2523, Doc. No. 222.

Accordingly, even though KL was served with the 9019 Motion, it failed to file an objection to the 9019 Motion and articulate its objection to Representative right to share in the judgment or settlement obtained by Mandl in the KL Action.

(i) No State Law Supports KL's Argument regarding Improper Assignment

Assuming the Court were to construe Section 3.3 of the Settlement Agreement as effectuating an assignment of the KL Action (which the Representative asserts is not the case), as admitted by KL, neither New York nor District of Columbia laws had or have any laws prohibiting the assignment of a malpractice claim. *See Motion* at 18. Accordingly, KL clearly seeks to try to establish a new precedent in DC in order to collaterally attack the Settlement Agreement Order. Given the foregoing, KL should be enjoined from engaging in the foregoing actions.

(ii) KL was a Party in Interest and could have Filed an Objection to the 9019 Motion

To preserve and assert is claims relating to an alleged assignment of the KL Action by

---

this Cross-Motion.

Mandl to the Representative (Section 3.3 of the Settlement Agreement), KL had a right and duty to object to the 9019 Motion as a party in interest pursuant to 11 U.S.C. §1109.

Because KL constituted a party-in-interest under 11 U.S.C. 1109 and having failed to avail itself of its right to appear and be heard in connection with the 9019 Motion, KL waived its rights with respect to the Settlement Agreement and Settlement Agreement Order and should be estopped from collaterally attacking the Settlement Agreement Order and Settlement Agreement.

In *In re Quigley*, 2008 Bankr.Lexis 2049 (Bankr.S.D.N.Y 2008), this Court addressed a set of facts very similar to those at bar; namely, the standing of an insurance company to appear and be heard by the Bankruptcy Court. In *Quigley*, certain insurers sought to object to the debtor's plan of reorganization with respect to provisions of the plan that would allow the assignment of the subject insurance policies without regard to the contractual requirement that the insurer give its consent to any assignment.

In *Quigley,* the Court discussed Section 1109 and its parameters stating:

> Section 1109(b) of the Bankruptcy Code 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." "Party in interest" is not defined in the Bankruptcy Code, *Krys v. Official Comm. of Unsecured Creditors of Refco, Inc. (In re Refco, Inc.),* 505 F.3d 109, 117 (2d Cir. 2007); *Roslyn Say. Bank v. Comcoach Corp. (In re Comcoach Corp.)*, 698 F.2d 571, 573 (2d Cir. 1983), and when interpreting the phrase, a court must be governed by the Bankruptcy Code's purpose. *Comcoach Corp.,* 698 F.2d at 573; *Southern Blvd., Inc. v. Martin Paint Stores (In re Martin Paint Stores),* 207 B.R. 57, 61 (S.D.N.Y. 1997).

*Quigley at **15*

> Consequently, 1109(b) has been interpreted [**17] to mean "that anyone who has a legally protected interest that could be affected by a bankruptcy proceeding is entitled to assert that interest with respect to any issue to which it pertains. . . ." *In re James Wilson Assoc.*, 965 F.2d 160, 169 (7th Cir. 1992)(Posner, J.)

Id.

The "person aggrieved" standard, a carryover from the bankruptcy act of 1898, is an

> additional prudential limitation on standing in bankruptcy appeals. *Duckor Spradling & Metzger v. Trust (In re P.R.T.C., Inc.),* 177 F.3d 774, 777 (9th Cir. 1999); see *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214 & n.20 (3d Cir. 2004). It concerns the "causal nexus between act and injury; appellant must show that he was 'directly and adversely affected pecuniarily by the order of the bankruptcy court' in order to have standing to appeal. *Gibbs & Bruns, LLP v. Thomas & Culp, LLP (In re Coho Energy Inc.),* 395 F.3d 198, 203 (5th Cir. 2004)(internal quotation marks and citation [**21] omitted).

*Quigley at **15, fn 5.*

The Court concluded that the insurers had the right to appear and be heard on issues that directed impacted their legal interests (I.e. the assignability of contracts under the plan).

In *In re High Voltage Engineering Corporation*, 397 B.R. 579 (Bankr.D.Mass 2008), in connection with a motion under FRBP 9019 seeking approval of a settlement agreement, the Court discussed the standing of parties who were not parties to the settlement agreement but whom could ultimately be liable for cleanup costs of an environmental site determining that given the financial risks to these parties rendered them a "persons aggrieved" if the settlement motion was approved by the Court. Id. at 31.

The *High Voltage* court explained that,

> The issue of standing is a "threshold question in every federal case, determining the power of the Court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975). To have standing to bring an appeal from a final bankruptcy court order, an appellant must be a "person aggrieved." *Spenlinhauer v. O'Donnell*, 261 F.3d 113, 117 (1st Cir.2001). As such, standing exists only where the order "directly and adversely affects an appellant's pecuniary interests." *Id.* At 117-118 (citation omitted). A party's pecuniary interests are affected if the order diminishes the appealing party's property, increases its burdens, or detrimentally affects its rights. *Kehoe v. Schindler (In re Kehoe)*, 221 B.R. 285, 287 (1st Cir. BAP 1998).

Id. at 597, citing In re Murphy, 288 B.R. 1, 4 (D.Me. 2002). *See also In re Amatex Corp.,* 755 F.2d 1034, 1042 (3d Cir. 1995); *on remand* 97 B.R. 220 (Bankr.E.D.Pa. 1989); *aff'd* 102 B.R. 411 (E.D.Pa.1989); *aff'd w/o opin.*, 908 F.2d 964 (3d Cir. 1990).

> The basis of determining whether a party is a party in interest is the determination of whether a party in interest has a "sufficient stake in the proceeding so as to require

> representation." *In re Amatex Corporation*, 755 F.2d [1034,] 1042[(3d Cir. 1985)]; *In re American Appliance*, 272 B.R. 587, 595 (Bankr. D.N.J. 2002). A sufficient state to be considered a party in interest can be a pecuniary interest that is directly or adversely affected by the proceedings. *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Committee,* 321 B.R. 147, 158 (Bankr. D.N.J 2005).

In re Lynx Associates, L.P , 2009 U.S.Dist. Lexis 3135, *37 (D.N.J 2009). *See also In re Timberon Water & Sanitation District*, 2009 Bankr. LEXIS 357 (Bankr.D.N.M 2009).

Inasmuch as KL had a pecuniary and legally protected interest in the outcome of the approval of the 9019 Motion, KL had standing and failed to assert such standing by filing an objection to the 9019 Motion.

Having failed to object to the 9019, KL should be estopped from raising objections in this forum or any other, as set forth in applicable caselaw.

For example, in *Presidential Life Ins. Co. v. Milken*, 946 F. Supp. 267 (S.D.N.Y. 1996), TLC raised challenges to the terms of a settlement agreement that had been approved by the court and entered into judgment three years earlier. The court held that TLC was estopped from challenging the settlement agreement. *Id.* at 278-79. The court found that TLC had notice of the terms of the settlement agreement and chose not to object to its terms at that point in time. As a result, the settling defendants were justified in their reliance on TLC's failure to object to the settlement. *Id.*

In *In re Anderson*, 362 B.R. 575 (Bankr. E.D.N.Y. 2007), Debtor's counsel sought payment of fees for legal services he provided to the Debtor from certain defendants who had already settled with the Trustee. The settlement agreement did not include any such provision for the payment of legal fees. Debtor's counsel had received notice of the motion to approve the settlement but he interposed no objection or opposition to the settlement agreement at that time. The court held that, as a result, upon approval of the settlement agreement, Debtor's counsel lost

any right he may have had to seek payment of his fees. *Id.* at 583.

Having failed to appear and object to the 9019 Motion, KL has now waived its right to challenge the provisions of the Settlement Agreement before this Court or in the KL Action and should be estopped from doing so.

(b) The Supremacy Clause, All Writs Act and Injunction Act all Mandate Enforcement of the Mediation Order and the Settlement Agreement Order

(i) Jurisdiction of the Court

As this Court is aware, the Representative was appointed pursuant to the terms of Teligent's Plan (Docket No. 01-12974, Doc. 1211) which provides in relevant part that "[t]he 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;

****

11. to enforce creditors' rights to payments and to the delivery of money or other Property to which holders of Allowed Claims may be entitled under the Plan;

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

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.

[12] "Funds" is defined under the Plan to include: "The Claim Fund, the Professional Fee Reserve Fund and the Unsecured Claim Fund." Plan at 4.

Based upon the express provisions of the Plan, the Court retains *exclusive jurisdiction* over the enforcement of the Settlement Agreement and the funds to be collected therefrom.

Moreover, pursuant to 28 U.S.C. § 157(b)(2(F) and (H), this Court has jurisdiction over actions to avoid and recover preferences and fraudulent conveyances as "core proceedings." 28 U.S.C. § 157(b)(2)(F) and (H).

(ii) The Settlement Agreement and Settlement Agreement Order must be Enforced under the Supremacy Clause and KL must be Enjoined from Collaterally Attacking the Settlement Agreement Order

The decision to approve a settlement lies within the clear discretion of the Bankruptcy Court. *In re Prudential Lines*, 170 B.R. 222, 246 (S.D.N.Y. 1994).

The Supremacy Clause, U.S. Const., art. VI, cl. 2, declares that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.

KL argues that the Settlement Agreement contains a provision that constitutes an improper assignment of the KL Action under state law, and thereby attempts to undermine the Bankruptcy Court's so-ordered approval of the Settlement Agreement. This argument is a "non-starter." *Hewlett v. United States Bankruptcy Court*, No. C 07-05532, 2007 U.S. Dist. LEXIS 83994, at *2 (N.D. Cal. 2007) (rejecting argument that Bankruptcy Court order was erroneous because it conflicted with state or local law; pursuant to Supremacy Clause, court order issued pursuant to Bankruptcy Code trumps state law). *See also In re Dial Business Forms*, 283 B.R. 537, 542 (8th Cir. 2002) (the "Supremacy Clause dictates that when state law is contrary to federal bankruptcy law, the bankruptcy provisions prevail"), *aff'd*, 341 F.3d 738 (8th Cir. 2003); *In re Consumers Realty & Development Co., Inc.*, BKY 98-40721, 1999 Bankr. LEXIS 35, at *32-33 (Bankr. D. Minn. Jan. 14, 1999) (same), *aff'd*, 238 B.R. 418 (8th Cir. 1999).

A state court ruling or order that conflicts with a Bankruptcy Court order violates federal supremacy and preemption in bankruptcy matters. *See In re Si Yeon Park Ltd.*, 198 B.R. 956, 970 (Bankr. C.D. Cal. 1996) ("Any order by the state court on the contempt motion would necessarily either conflict with or duplicate the entered bankruptcy court order. Under the circumstances, the repeated refusal of the state court judge to cease further proceedings interferes with this Court's jurisdiction, ignores federal supremacy and preemption in bankruptcy matters, and should stop."[13]). *See also In re Spats Restaurant & Saloon*, 64 B.R. 442, (Bankr. D. Nev. 1986) (to the extent Bankruptcy Code provisions "are inconsistent with state law, the Supremacy Clause mandates that the court follow bankruptcy law").

In *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982), the Court discussed the effect of the Supremacy Clause on state laws that run contrary to the Bankruptcy Code stating,

> In *Perez v. Campbell*, 402 U.S. 637, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971), the Court struck down an Arizona statute that conflicted with section 17 of the Bankruptcy Act of 1898, 11 U.S.C. § 35 (1976) (repealed). Section 17 provided that a discharge in bankruptcy discharges all but certain specified judgments. The conflicting Arizona statute provided that the state would not recognize a discharge in bankruptcy of an automobile accident tort judgment in that, if the debtor-driver did not pay the judgment, the state would withhold driving privileges.
>
> It was undisputed in *Perez* that Arizona generally possesses plenary authority to regulate the drivers of automobiles on its highways (just as Wisconsin, in the instant case, possesses plenary authority to regulate judges' salaries) and that insuring the financial responsibility of such drivers was a legitimate state policy undergirding the state statute. But meritorious and important purposes alone were insufficient to save [**23] the Arizona statute from federal preemption when the effect of the state statute was to frustrate the federal statute's protection of debtors discharged in bankruptcy.

[13] In *Si Yeon Park*, a former receiver filed a motion for contempt in state court, contending that the filing of an adversary complaint in bankruptcy court violated a state law that requires any party wishing to sue a state-court appointed receiver to obtain permission from the state court. The state court judge issued the order to show cause for contempt of court. Meanwhile, the Bankruptcy Court concluded that the adversary proceeding did not constitute contempt of court. Nonetheless, the state court ordered the contempt hearing to proceed. The Bankruptcy Court concluded that the state court lacked jurisdiction to proceed any further in the matter. But while the Court found that it had power to enjoin *individuals* in state court proceedings where necessary to aid its jurisdiction, it found that it did not have power to enjoin a state court judge or the state court as an institution. *In re Si Yeon Park*, 198 B.R. at 969-70.

Id. at 479.

This well-settled proposition of law applies equally in the context of settlement agreements that have been approved by a federal court. *See Kirkland v. New York State Dep't of Corr. Servs.*, 711 F.2d 1117, 1132 (2d Cir. 1983) (no need to consider whether settlement agreement in Title VII case violated state law because "state law must yield to federal law" in field preempted by federal law), *cert. denied*, 465 U.S. 1005 (1984). Supremacy of federal law in bankruptcy matters should therefore protect the Bankruptcy Court's Order approving the Settlement Agreement from interference by actions undertaken by Williams & Connolly in the D.C. action.

Two federal statutes, the Anti-Injunction Act and the All Writs Act, operate to preclude KL from seeking to undo or void either the Settlement Agreement Order, the underlying Settlement Agreement approved by the Court and the Mediation Order.

To "ensure the effectiveness and supremacy of federal law," the Anti-Injunction Act, 28 U.S.C. § 2283,[14] specifically authorizes federal courts to guard against relitigation of issues previously resolved through their judgments. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). Under the Anti-Injunction Act, a federal court is authorized to enjoin a state court action (1) where "expressly authorized by Act of Congress," or (2) if "necessary in aid of jurisdiction" or (3) "to protect or effectuate its judgments." 28 U.S.C. § 2283.

Similarly, the All Writs Act, 28 U.S.C. § 1651, specifically 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.

[14] 28 U.S.C. § 2283 provides: "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."

(A) Anti-Injunction Act

(*i*) *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. at 966-67; *In re Neuman*, 71 B.R. 567, 571-72 (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." *In re Si Yeon Park*, 198 B.R. at 967 (internal citation omitted); *In re Neuman*, 71 B.R. at 571 (internal citation omitted).

(*ii*) *Relitigation Exception*

The Anti-Injunction Act's authorization of a federal court injunction "to protect or effectuate its judgment" 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*, 486 U.S. at 147.

Thus, "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided by the federal court*." *Id*. at 148 (emphasis added). In *Chick Kam Choo*, the

Supreme Court reviewed its own precedent and emphasized that "this prerequisite is strict and narrow." *Id*. In a prior case, in determining whether or not to permit application of the relitigation exception, "[t]he Court assessed the precise state of the record and what the earlier federal order *actually* said; it did not permit the District Court to render a *post hoc* judgment as to what the order was *intended* to say." *Id*. *See also Hanover Ins. Co. v. Olin Corp.*, No. 92 Civ. 4278, 1995 WL 598984, at *2 (S.D.N.Y. Oct. 11, 1995) ("[A] federal court is authorized to enjoin only that which has been previously decided and no more. We are obligated to read previous court orders literally and construe them strictly. Enjoining a state court proceeding is a matter not to be undertaken lightly as it impinges on the delicate balance struck between the federal and state judicial systems.").

(iii) 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 or an in rem proceeding or in the custody if a bankruptcy trustee[.]" *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1103 (11th Cir. 2004).

(B) All Writs Act

"It is well settled that the courts of the United States have the inherent and statutory (28 U.S.C.A. § 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), *amended on other grounds, on recon.*, 2004 U.S. Dist. Lexis 10931 (S.D.N.Y 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 v. Webley*, 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. National Football League*, 41 F.3d 402, 409 (8th Cir. 1994) (federal district court approved settlement agreement in complex class action lawsuit and enjoined related actions pursued in other fora), *cert. denied* 515 U.S. 1137, 115 S. Ct. 2569, 132 L. Ed. 2d 821 (1995); *see also In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (holding All Writs Act "permits a district court to enjoin actions in state court where necessary to prevent relitigation of an existing federal judgment"). 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 Securities Litigation*, 103 F.3d 1317, 1323-26 (7th Cir. 1996); *Agent Orange*, 996 F.2d at 1431.[15]

Hillman, 115 F.3d at 1468.

[15] In *Agent Orange*, the Second Circuit noted that it "is the [district] court that approved the settlement and entered the judgment enforcing it," and held that removal under the All Writs Act of an otherwise unremovable state court action was proper because "[t]he district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction." *Agent Orange*, 996 F.2d at 1431.

(ii) Application To This Case

The principles embodied in the All Writs Act and the Anti-Injunction Act can persuasively be applied to the case at bar, as illustrated by *ONBANCorp., Inc. v. Holtzman.*, No. 96-CV-1700, 1997 U.S. Dist. LEXIS 9502 (N.D.N.Y. June 27, 1997), *aff'd*, 1997 U.S. App. LEXIS 28453 (2d Cir. Oct. 9, 1997).

In *ONBANCorp.*, the district court granted an injunction under the "relitigation exception" of the Anti-Injunction Act in order to protect a Confidentiality Order it had issued, which a party then sought to undermine in a separate state court action. (Notably, plaintiff ONBANC sought the injunction pursuant to the All Writs Act; defendant Holtzman opposed on the basis that the relief sought was barred by the Anti-Injunction Act. The court rejected Holtzman's argument, finding that the "relitigation exception" of the Anti-Injunction Act applied.)

Plaintiff ONBANC first sued defendant Holtzman in the district court. A year later, Holtzman sued ONBANC and others in state court. The parties negotiated a confidentiality agreement that was designed to govern discovery in both the federal and state court actions. Holtzman's attorney specifically agreed that the confidentiality agreement would bind Holtzman in both actions. Following negotiation of the Confidentiality Order, the Magistrate Judge signed it. Thereafter, Holtzman's attorneys advised that Holtzman would no longer agree to the entry of a common Confidentiality Order in the state action, and would seek to modify it. Holtzman's attorneys insisted on going forward with depositions in the state court action despite the absence of any confidentiality stipulation or order. ONBANC's attorneys viewed Holtzman's refusal to enter the common Confidentiality Order in the state action as an evasion of the federal Confidentiality Order. ONBANC asserted that there was a substantial overlap between the

discovery sought in the federal and state actions and therefore the same documents would be produced in both actions. Consequently, ONBANC contended that to allow Holtzman to seek discovery in the state action without adhering to the terms of the Confidentiality Order would "render the protection of that order illusory." *ONBANCorp.*, 1997 U.S. Dist. LEXIS 9502, at *20. (We want to make a similar argument.)

ONBANC filed for a TRO and an injunction in the district court to bar Holtzman and anyone acting on his behalf from seeking any discovery in the state action until an order containing the terms of the district court's Confidentiality Order was entered in the state court action.

The district court signed the order to show cause and the TRO, and ultimately enjoined Holtzman from seeking or procuring discovery that had been sought or produced in the federal court action unless and until an order incorporating the terms of its Confidentiality Order was entered in the state court action. The district court relied on the relitigation exception of the Anti-Injunction Act in reaching this result, and a previous Second Circuit opinion in particular, *Sperry Rand Corp. v. Rothlein*, 288 F. 2d 245 (2d Cir. 1961):

> In *Sperry Rand*, the Second Circuit upheld a district court's injunction against use of material divulged during discovery in a federal court 'even after resort to such discovery processes as were available in the state courts.' *Sperry Rand*, 288 F.2d at 248. *The district court acted to prevent a plaintiff* – which had been given a discovery priority in federal court – *from taking unfair advantage of that priority by using the discovery materials from the federal action to support a preliminary injunction application in a newly commenced state court action on the same claim*. *Id*. The Second Circuit held that (1) the order was not subject to the Anti-Injunction Act since it merely put the plaintiff in the same position that it would have been in had it not first commenced the federal action and (2) *the order was necessary to effectuate the court's prior order on discovery priority*. *Id.*

ONBANCorp., 1997 U.S. Dist. LEXIS 9502, at *22 (emphasis added).

The district court in *ONBANCorp*. was not bothered by the "actually decided" prerequisite (discussed *supra*), noting, *inter alia*, that the order protected in *Sperry Rand* was a scheduling order "having no facial applicability to any state proceeding." *Id.* at *24-25. What was important was that "the Second Circuit upheld a second order precluding the plaintiff from using the fruits of the federal discovery process in the state action because their use would undermine the priorities established by the prior [federal] order." *Id*. at *25. The district court found that if by using the state court process, Holtzman could get the same documents without confidentiality protections, the Magistrate Judge's Order would be illusory. *Id*. at *26. This same concern – protecting the intent and purpose of the Bankruptcy Court's order – is present in the case at bar.

Notably, the district court in *ONBANCorp*. did not go so far as to grant ONBANC's broad request for an injunction with respect to "any discovery from any defendant," or to discovery demands that had not been made in the federal court action. *Id*. at *28-29. Rather, the injunction enjoined Holtzman from seeking or procuring discovery that had been sought or produced in the federal action unless and until an order incorporating the terms of the district court's Confidentiality Order was entered in the state court.

Based upon the *ONBANCorp decision,* the Bankruptcy Court may enforce its Confidentiality Order and the Mediation Order, and may even enter an order to restrict discovery and motion practice in the D.C. action to the extent it undermines the Confidentiality Order and Settlement Agreement Order[16], to which both the Representative and Mandl are bound.[17]

[16] The Settlement Agreement Order provides in relevant part that "the Court having determined that the legal and factual bases set forth in the [9019] Motion established just cause for the relief granted herein….the Agreement is hereby approved pursuant to Rule 9019 and the Procedures Order and the Parties to the Agreement shall have the rights and privileges set forth in the Agreement..[and] the Representative is authorized to take all such action necessary under the Agreement to effectuate the Agreement.". Ex. 13 to Motion.

It is important to note that both the Mediation Order and the Settlement Agreement Order were entered to further the purposes of the Bankruptcy Code which purposes include "convert[ing] the bankrupt's estate into cash and distribute it among creditors." *In re Comcoach Corp.,* 698 F.2d 571, 573 (2d Cir. 1983).

Here, upon avoiding the transfer, the value of the Judgment become property of Teligent's estate. 11 U.S.C. 541(a)(3) and (4). In the Post-Trial Decision awarding the Representative judgment against Mandl, the Court determined that the Representative could recover the transferred asset or the value thereof. Upon filing the Judgment in counties in which Mandl had assets, the Representative had the right to liquidate all of Mandl's assets to satisfy the Judgment (as his total assets did not exceed the Judgment amount) and commenced appropriate proceedings to do so. This Judgment constituted a lien on Mandl's right to sue KL (an asset of Mandl's) and the Representative asserted its legitimate right to a portion of this asset, once liquidated and quantifiable.

The same principles of supremacy of federal law (*i.e.*, the principles underlying the exceptions to the Anti-Injunction Act, supplemented by § 105 of the Bankruptcy Code, as well as the All Writs Act) are also applicable to oppose KL efforts to undermine the Settlement Agreement on state law grounds. *See, e.g.*, *Kirkland v. New York State Dep't of Corr. Servs.*, 711 F.2d 1117, 1132 (2d Cir. 1983); *cert den.*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984) (not even considering whether settlement agreement violated state law because "state law must yield to federal law" in field preempted by federal law).

Importantly, KL cannot be heard to argue that principles of supremacy embodied in the All Writs Act and the Anti-Injunction Act do not apply here because KL was not a party to the

[17] Note that the Representative is also bound by ¶ 12 of the Settlement Agreement, by which the Representative agreed not to disclose any information learned or obtained during settlement discussions.

mediation between the Representative and Mandl in the federal Bankruptcy case. As noted above, 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 *United States v. New York Tel. Co.*, 434 U.S. at 174), *aff'd*, 1997 U.S. App. LEXIS 28453 (2d Cir. Oct. 9, 1997)).

For example, Judge Haight recently applied the All Writs Act to various associations of contractors who were not parties to an underlying RICO action between the U.S. Government and a labor union's district council, where the non-party associations placed themselves in the position of frustrating the implementation of certain job referral rules incorporated into a Consent Decree issued in the RICO action. *United States v. District Council of New York City*, 592 F. Supp. 2d 708, 716-17 (S.D.N.Y. 2009).

KL's efforts to collaterally attack the Settlement Agreement Order and void a portion of the Settlement Agreement threatens the integrity of the Settlement Agreement Order, the jurisdiction of the Court and the finality of the Settlement Agreement Order which has been substantially performed by Mandl.

If Section 3.3 of the Settlement Agreement is imperiled or ultimately voided, the entire Settlement Agreement, upon which the Parties have relied since its entry, is eviscerated and an utter mess results: the Parties will have to go back to Mediation or move forward with the post-trial motions; the Judgment, which has been withdrawn in several jurisdictions and reduced via payments under the Settlement Agreement to date, would have to be refilled and revised in applicable jurisdictions; funds paid under the settlement would have to be returned to Mandl; given the disclosures of documents that were once privileged (attorney-client) and have now been produced in the KL Action, the Representative will gain significant leverage in the post-trial motions and in mediation discussions; Mandl will have suffered incredible losses from liquidating assets to pay funds due under the Settlement Agreement arising from penalties and taxes he had to pay on liquidated assets.

Based upon the foregoing, it is respectfully requested that this Court enjoin KL from collaterally attacking the Settlement Agreement and Settlement Agreement Order in the KL Action or in any other forum.

II. KL must (a) Return all Mediation I and Mediation II Documents, (b) seal all depositions in which questions were asked relating to the Mediations, (c) be enjoined from deposing the Mediator or subpoenaing him to testify at the KL Action trial and (c) be enjoined from asking any questions or utilizing any document related to or prepared in connection with the Mediation at the KL Action Trial

In the event the Court denies the Motion in whole or part, the Representative respectfully requests that this Court enter an order directing KL to (a) return all Mediation I and Mediation II Documents, (b) seal all depositions in which questions were asked relating to the Mediations, (c) be enjoined from deposing the Mediator or subpoenaing him to testify at the KL Action trial and (c) be enjoined from asking any questions or utilizing any document related to or prepared in connection with the Mediation at the KL Action Trial.

III. The Representative Requests that this Court impose monetary sanctions on WC, KL and HLH for violations of the Mediation Order and General Order

HLH, WC and KL each knowingly and intentionally violated the Mediation Order and Confidentiality Order.

Exhibit 15 to the Motion contains a letter from HLH to WC dated December 3, 2008 in which HLH notifies WC that there is a mediation privilege and yet HLH delivers all Mediation II Documents to WC without regard to this acknowledged confidentiality mandate. *See Exhibit 15 at 1.* Given HLH and WC's knowledge of the mediation confidentiality, both parties should have moved to lift the confidentiality provisions of the Mediation Order and the General Order prior to the turnover of any Mediation II Documents or attempting to question any witnesses in the KL Action regarding the Mediation II. Both HLH and WC failed to do so. At this time, the Representative is unaware of what other witnesses may have been questioned about the Mediation I and Mediation II and/or shown documents from the Mediation I and II who were not parties thereto. The Representative believes it is incumbent on WC and HLH to provide a copy of all depositions taken to date in the KL Action so that the Representative and this Court can make certain that all depositions are seal in connection with questions and documents relating to the Mediations.

Furthermore, upon being notified by the Representative that all documents and discussions relating to the Mediations are confidential, WC failed to notify the Representative that it received Mediation II documents from HLH and, but for, the Representative's demand to know whether such documents were in WC's possession, the Representative may never have been told of WC's possession of the Mediation II Documents nor WC's intent to utilize such documents at depositions and at the KL Action trial.

Even after the Representative demanded WC return all documents to HLH (*See Exhibit 16 to the Motion*), WC refused to do so. *See Exhibit 17 to the Motion.* While WC, in its Motion, states it finally returned all Mediation II Documents to HLH, the Representative does not know when this occurred and believes it was after WC reviewed all the Mediation II Documents, thereby breaching the confidentiality provisions of the Mediation and General Order. Accordingly, the horse was already out of the barn by the time WC closed the barn door.

Based upon this intentional and egregious violation of the Mediation Order and General Order, the Representative respectfully requests that monetary sanctions be imposed against WC, KL and HLH. The Representative requests that the sanctions include any appropriate amount the Court determines as a penalty, in addition to an award of costs and fees incurred by the Representative in drafting the Objection and Cross-Motion.[18] *Bernard v. Galen Group, Inc.*, 901 F.Supp 778 (S.D.N.Y. 1995)(Where an attorney violated a trial court judge's mediation order and the confidentiality provisions contained therein willfully and deliberately and the violation is serious and egregious, sanctions are appropriate).

CONCLUSION

WHEREFORE, the Representative respectfully requests that the Court enter an order:

On the Objection:

1. denying the Motion *in toto*

On the Cross-Motion:

1. granting the Cross-Motion *in toto;*
2. enjoining HLH (or any other person) from producing or delivery Mediation I

[18] The Representative requests that if the Court imposes sanctions on HLH, the Court enter an order directing that such sanctions may not be included by HLH as costs or expenses in connection with the KL Action, as such costs and expenses would reduce the sum derived from a judgment or settlement in KL Action that must be remitted to the Representative under the Section 3.3 of the Settlement Agreement.

Documents and Mediation II Documents to WC, KL or any other person;

3. enjoining WC, KL and HLH from utilizing any Mediation I Documents at any deposition of any party not present at the Mediation I, and enjoining WC, KL and HLH from introducing into evidence or questioning any witnesses regarding any the Mediation I or the Mediation I Documents at trial;

4. enjoining WC, KL and HLH from utilizing any Mediation II Documents at any deposition of any party, and enjoining WC, KL and HLH from introducing into evidence or questioning any witnesses regarding any Mediation II Documents or the Mediation II at trial;

5. directing WC and KL to return all Mediation II Documents to HLH and directing HLH, WC and KL to deliver to the Representative copies of all depositions taken to date in the KL Action; and

6. imposing monetary sanctions against HLH, WC and KL for the willful and deliberate violation of the Mediation Order and General Order.

Dated: Croton on Hudson, New York
April 24, 2009

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