

**IN THE CIRCUIT COURT OF THE  
SIXTH JUDICIAL CIRCUIT OF FLORIDA  
IN AND FOR PASCO COUNTY  
CIVIL DIVISION**

**OFFICE OF THE ATTORNEY GENERAL,  
DEPARTMENT OF LEGAL AFFAIRS,  
STATE OF FLORIDA,**

**Plaintiff,**

**Case No.: 51-2010-CA-2912-WS/G**

**vs.**

**BOTFLY, LLC, DAVID R. LEWALSKI,  
and JON J. HAMMILL,**

**Defendants.**

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**BOTFLY INVESTORS' MOTION TO INTERVENE  
and  
MEMORANDUM OF LAW  
MOTION TO INTERVENE**

COME NOW Proposed Intervenors whose names are set forth in the attached sealed envelope, pursuant to the court's order of confidentiality, in accordance with *Rule 1.230, Fla.R.Civ.P.*, and respectfully move that the court permit them to intervene on behalf of themselves as holders of promissory notes from Botfly, L.L.C., and as grounds therefore state:

1. Proposed Intervenors are all investors in, and holders of, promissory notes from Botfly, LLC.
2. Proposed Intervenors are directly, immediately, and substantially affected by the court's proceedings in this action.
3. It is necessary for Proposed Intervenors to participate as a party in these proceedings of this court for the following reasons.

a. i. The receiver does not appear to be acting in the best interest of the Proposed Intervenor. For example, the receiver did not even include the hourly rate of the attorneys it asked the court to approve. The only way anyone is aware of the receiver's attorneys' fees is from reading the receiver's attorneys' reports. The amounts of the fees should have been made available to the plaintiff and the court, for them to determine if the fees to be charged were reasonable and proper for the area and for the work to be performed. The Proposed Intervenor should be permitted to participate in any future decisions of this magnitude.

ii. Proposed Intervenor should be able to respond to the various motions and other pleadings and papers filed herein, and participate in the proceedings as they arise. For example, the receiver's attorney filed a motion to approve the administration of claims and of the proof of claims form, which the Proposed Intervenor submit was filed prematurely. This motion should not even have been drafted or filed until after the trial in this matter resulted in a final adjudication on behalf of the plaintiff. Motions to Dismiss have been filed and not yet ruled upon. If granted, the receiver's actions would be useless, and any fees awarded would be for nothing. The Proposed Intervenor should be permitted to respond to this filing and other filings as they are made so that the Proposed Intervenor may present argument that the receiver's attorneys should not be awarded any fees or costs associated with such motion or hearing thereon until or unless this matter results in a victory on behalf of the plaintiff, because then and only then will that motion and hearing, and any fees claimed therefor, become necessary.

iii. Another example: the receiver's attorneys served a subpoena duces tecum on a witness giving him only one day to appear for the deposition and bring the records

identified. One day is *per se* insufficient and caused the witness to have to hire an attorney to ask that the subpoena be quashed. The Amended Order Appointing Receiver required five days' notice. If the receiver's attorneys request payment for preparing and serving this subpoena, or for reviewing and/or responding to the motion to quash, they should be denied. If the receiver's attorneys improperly had a subpoena served, they should be responsible for it, and the investors should not have funds further diminished because of inappropriate action by the receiver or its attorneys.

iv. The receiver's fees and the receiver's attorneys' fees are based on time records that do not disclose the reasons for the fees. An entry of "Emails/Phone Calls" or "Returned various phone calls" with the amount of time spent and the amount to be charged is insufficient to apprise anyone of what the receiver or the receiver's attorneys did to deserve payment and a request for fees thereon would be rejected in other civil actions.

b. Proposed Intervenors should be permitted to engage in discovery to determine their position and to protect their interests, since Proposed Intervenors are the persons most directly affected by these proceedings.

c. The court proceedings posted by the receiver on its website are incomplete and do not inform or enlighten the Proposed Intervenors as to the progress of the proceedings. The status of the proceedings cannot be determined without a visit to the Clerk of the Court and a physical review of the files, which for many, if not most, of the investors is unreasonable and places an excessive and unjust burden on the Proposed Intervenors. Therefore, the Proposed Intervenors should be on the certificate of service list so that they may be kept apprised of the proceedings.

d. Because of the recent activities that have occurred relating to Botfly and Lewalski, it became urgent that the Proposed Intervenors take this action at this time.

e. Many investors are appearing at hearings, and requesting that they be heard. Some of their comments and questions are valid and should be aired, but some of them are not within the power or jurisdiction of the court. The investors should have one spokesperson who presents their questions and concerns to the court, and distinguishes between those that the court is able to address and those that are irrelevant to the proceedings.

f. The Proposed Intervenors on whose behalf this action was brought must have a voice in these proceedings. Therefore, it is essential, just, and appropriate that the substantially, directly, and immediately affected Proposed Intervenors be allowed to intervene and participate in these proceedings as a full party to protect their own interests.

#### **MEMORANDUM OF LAW**

A. A motion to intervene is within the discretion of the trial court. *Rule 1.230, Fla.R.Civ.P.* states, “Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention....”

B. The trial court’s denial of a motion to intervene is reviewed for abuse of discretion. [*Wingrove Estates Homeowners Ass’n v. Paul Curtis Realty, Inc.*, 744 So.2d 1242, 1243 (Fla. 5<sup>th</sup> DCA 1999.)]

C. “A person seeking leave to intervene must claim an interest of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.” [*Union Cent. Life Ins. Co. v. Carlisle*, 593 So.2d 505, 507 (Fla. 1992)].

It simply cannot be disputed that no one has a greater, more direct or immediate interest in the outcome of these proceeding than Proposed Intervenors.

D. 1. While it may be true that there is no absolute right to intervene [*Fla. Wildlife Fed'n, Inc. v. Bd of Trs. Of the Internal Improvement*, 707 So.2d 841, 842 (*Fla. 5<sup>th</sup> DCA 1998*)], it is also true that, “[A] class member who claims that his ‘representative’ does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.” [*Litvak v. Scylla Properties, LLC*, 946 So.2c 1165, 1170 (*Fla. 1<sup>st</sup> DCA 2006*)].

2. Although *Litvak* involved a class action in which the Proposed Intervenors were a part of the class, it can and should, by extension and analogy, apply to this case wherein the Attorney General’s office purports to represent the interests of the Proposed Intervenors (per allegations in original and amended complaints). An unfavorable judgment against the Attorney General or, indeed, any party could certainly be applied to the Proposed Intervenors in the form of collateral estoppel.

E. 1. While caselaw states an intervenor is bound by the record made at the time he intervenes and must take the suit as he finds it, [*Nat'l Wildlife Fed'n Inc. v. Glisson*, 531 So 2d 996, 998 (*Fla. 1<sup>st</sup> DCA 1988*)], it is also true that a judge’s denial of a motion to intervene that would effectively deny a person the opportunity to oppose certification as a mandatory class, the judge will be considered to abuse his discretion in

denying the motion to intervene as named parties. [*Litvak v. Scylla Properties, LLC*, 946 So.2d 1165, 1172 (Fla. 1<sup>st</sup> DCA 2006)].

2. While *Litvak* was a class action suit in which the movants of the motion to intervene were members of a mandatory class, *Litvak* can and should be analogous to the situation with the Proposed Intervenors in this case because they are, in effect and for all practical purposes, members of a mandatory class who are not permitted to opt out and whose members are not being adequately represented in this proceeding.

F. Therefore, based on the factual allegations as recited above and the cited rule and caselaw, it is apparent that Proposed Intervenors should be permitted to intervene as full named parties to these proceedings (i) to protect their own interests and participate in these proceedings, (ii) because they are not being represented in this case by any named party, and (iii) because intervention in any status less than full party status will not adequately resolve the problems besetting Proposed Intervenors by not being adequately represented.

WHEREFORE, for the above reasons, Proposed Intervenors respectfully move that the Court grant this motion and permit them to intervene in this action as named parties with full party status on their own behalf, and also permit Proposed Intervenors to add names of persons seeking to belong to this list of Proposed Intervenors as they arise.

Respectfully submitted on January 14, 2011.

/s/ Gabriel Mazzeo  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT a true copy of the above and foregoing has been furnished by U.S. Mail to the following persons on January 14, 2011:

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