

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In Re:)	Case No. 02-16172
Level Propane, Gases, Inc., <i>et al.</i> ,)	
Debtors.)	Ch. 11
)	
*****)	Hon. Randolph Baxter
Maxus Leasing Group, division of)	
Maxus Capital Group, LLC)	
31300 Bainbridge Road)	
Cleveland, Ohio 44139,)	
Plaintiff,)	Adv. Pro. Case No. 09-1118
)	
vs.)	
)	
Mark Uhrich, Plan Administrator)	
of the Consolidated Estate of)	
Level Propane Gases, Inc.)	
c/o Benesch, Friedlander, Coplan)	
& Aronoff, LLP)	
2300 BP Tower)	
200 Public Square)	
Cleveland, Ohio 44113,)	
for the Defendants.)	

**MOTION TO INTERVENE OF THE CERTIFIED CLASS OF OHIO RESIDENTIAL
CUSTOMERS OF LEVEL PROPANE GASES, INC.**

Now comes the Certified Class of Ohio Residential Customers of Level Propane Gases, Inc. (hereinafter Certified Class), a party in interest in the above-captioned Chapter 11 Proceedings, by and through counsel undersigned counsel, and moves to intervene in the above-captioned adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7024 and Federal Rule of Civil Procedure 24 for the reasons set forth below.

PROCEDURAL BACKGROUND

On April 2, 2009, Maxus Capital Group (hereinafter Maxus) brought suit to revoke the October 9, 2008 Confirmation of the Plan of Liquidation in this Chapter 11 case, styled *Maxus Capital Group v. Mark Uhrich, Plan Administrator*, Adv. Pro. Case No. 09-1118. In its Complaint, Maxus seeks revocation of the Plan of Liquidation pursuant to 11 U.S.C. § 1144, and other relief, specifically that certain agreed orders, converting the case from a Chapter 7 to a Chapter 11, approving a global settlement, approving distribution of settlement and litigation proceeds, be adjudicated null and void. The Certified Class anticipates that Maxus may soon file an amended complaint, in which Maxus and the Certified Class will both be named Plaintiffs. Until such time, the Certified Class moves to intervene as a matter of right in this Adversary Proceeding, hereby putting Defendants on notice of its intention to act as a Plaintiff in this action.

LAW AND ARGUMENT

I. The Certified Class May Intervene as a Matter of Right.

Fed. R. Civ. P. 24(a)(2) provides for intervention as a matter of right for any person who: claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

As does Maxus, the Certified Class seeks to revoke Confirmation of the Liquidation Plan, because both Maxus and the Certified Class contend that fraud on the court occurred. Maxus and the Certified Class seek ultimate different remedies, however. As such, the Certified Class may intervene in this Adversary Proceeding as of right, pursuant to Bankr. R. 7024, incorporating Fed. R. Civ. P. 24. This Sixth Circuit has interpreted the rule strictly by its terms to permit

intervention in the appropriate circumstances, applying the elements of Rule 24 to applications for intervention as of right. The first requisite is that a Motion to Intervene be timely:

a court will consider the following factors: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Grubbs v. Norris, 870 F.2d 343, 345-46 (6th Cir. 1989). Here, (1) the Motion is timely – the Complaint initiating the Adversary Proceeding was filed on April 2, 2009, and there has been no responsive pleading, let alone time for a return of service; (2) its purpose is within the contemplation of the rule – the Certified Class seeks to intervene in order to participate in the Complaint to Revoke the Confirmation in order that it might pursue relief otherwise unavailable to it were it not to so participate; (3) the intervenor knew about the Maxus Complaint for four (4) days – the Maxus Complaint was filed on April 2, 2009, the Certified Class could not be reasonably expected to have known of the case prior to that date; (4) the intervention will present no prejudice any original party – there has been no practical delay on the part of this intervenor, since it seeks intervention within days of the filing of the original complaint; and (5) there are no unusual circumstances militating against intervention – the Certified Class has a parallel interest to that of Maxus in revoking the Confirmation, but intends to seek relief as to the restoration of its class settlement that Maxus cannot possibly seek on behalf of the Certified Class.

The Certified Class as intervenor satisfies each of the elements of Rule 24(a) as interpreted in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1996). *Michigan State*

AFL-CIO found a substantial legal interest when an association was “permitted to intervene as of right in order to defend their financial interests.” *Id.* at 1246. Similarly, the Certified Class has a substantial legal interest in that it is a “party in interest,” with a \$20 million claim, capable of seeking revocation of the Confirmation of the Liquidation Plan. *Michigan State AFL-CIO* only requires a would-be intervenor to show that impairment of its substantial legal interest is possible if intervention is denied stating, “this burden is minimal.” *Id.* at 1247. Here, if the Maxus challenge to the Confirmation of the Liquidation Plan is turned down by this Court, the Certified Class is without recourse – it cannot appeal a decision to which it is not a party.

Finally, the Certified Class has to demonstrate that the Plaintiff in this action, Maxus, cannot adequately protect the Certified Class’ interests. Under the *Michigan State AFL-CIO* analysis, “One is not required to show that the representation will in fact be inadequate. For example, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments.” 103 F.3d at 1247. Here, the Plaintiff may focus one set of facts that will go to its particular remedy, leaving facts supporting the Certified Class’ facts to one side, so that its goal of restoration of the Class Settlement Agreement goes unrealized. The mere possibility is sufficient. That possibility exists in this litigation, and that possibility supports the Certified Class’ right to intervene.

The result in *Michigan State AFL-CIO*, *supra*, is instructively contrasted to *In Re Troutman Enterprises*, 286 F.3d 359, 365 (6th Cir. 2002) when intervention was denied when it was sought a year and a half after the adversary proceeding had commenced, after the standing of the shareholders, who the proposed intervenors maintained had to that point adequately represented their interests, had been successfully challenged after a protracted litigation by the Trustee of which the proposed intervenors had long-standing knowledge. Here, intervention is

sought days after the filing of the Complaint, upon a showing that the Plaintiff will represent its own interests, not those of the Certified Class, which are distinct from that of the Plaintiff.

II. In the Alternative, The Certified Class Should be Granted Permissive Intervention

The Certified Class has demonstrated above that, as a matter of right, it may intervene. If the grounds for intervention set out in Fed. R. Civ. P. 24(a) are satisfied, as here, then permissive intervention as set out in Rule 24(b) is, per force, satisfied, see *Michigan State AFL-CIO*, 103 F.3d at 1248. Here, every reason exists to grant this intervention permissively: the legal interests of the Plaintiff and intervenor, though aligned, significantly differ, the interests of judicial economy would be served by the intervention, and no prejudice to any party would arise from the intervention.

CONCLUSION

For the reasons set forth above, the Certified Class asks that this Court grant its Motion to Intervene in order to effectively protect its interests.

Respectfully Submitted,

/s/ Kimberly M. Skaggs

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SERVICE

I hereby certify that on this 6th day of April, 2009, the foregoing was filed electronically. Notice of this filing will be sent to all parties named in the complaint with their summons. Parties may also access this filing through the Court's system.

/s/ Kimberly M. Skaggs
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