

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO**

In re:)	Chapter 11
)	
LEVEL PROPANE GASES, INC., <i>et al.</i> ,)	Case No. 02-16172
)	Jointly Administered
Debtors.)	
)	Randolph Baxter
)	
)	Adversary Proceeding No. 09-01116
)	
BILL WILHELM,)	
)	
Plaintiff,)	
)	
v.)	
)	
MARK UHRICH, PLAN)	
ADMINSTRATOR,)	
)	
Defendant.)	

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT’S
MOTION TO DISMISS COMPLAINT OF PLAINTIFF BILL WILHELM**

In his opposition to the Motion to Dismiss of defendant Mark Uhrich, the Plan Administrator of the Consolidated Estate of the Debtors (the “Plan Administrator”), plaintiff Bill Wilhelm (“Plaintiff”) all but abandons the causes of actions and legal theories asserted in his Complaint. Unable to point to any specific “misrepresentation” or “fraudulent concealment” made by the Plan Proponents¹ in connection with the proceeding leading to the entry of the Confirmation Order on October 9, 2008, Plaintiff argues that the Complaint states a claim for revocation of confirmation because it purports to allege facts showing that the Debtors’ chapter 11 proceedings were “unlawful” from their inception and that the Plan confirmed by the Court

¹ Unless otherwise indicated, capitalized terms used in this Memorandum have the same meaning as defined in the Plan Administrator’s initial Memorandum in Support.

“advanced an unlawful scheme.” In doing so, Plaintiff makes clear that he has filed this action for the purpose of challenging and re-litigating virtually every issue decided and every event that occurred during the course of the Debtors’ chapter 11 proceedings. Plaintiff’s contentions in opposition to the Motion are without merit and, in fact, contrary to controlling law. Accordingly, the Court should grant the Plan Administrator’s Motion to Dismiss.

A. PLAINTIFF HAS FAILED TO ADDRESS THE REASONING AND AUTHORITIES ADVANCED BY THE PLAN ADMINISTRATOR IN SUPPORT OF THE MOTION TO DISMISS.

As an initial matter, Plaintiff fails in his Opposition to address the arguments and authorities actually made by the Plan Administrator in support of dismissal. He makes no attempt to show how his three “collateral” claims (Complaint at ¶¶ 35-39) state a valid claim for injunctive relief or are not otherwise barred as a result of the Confirmation Order. Nor does he address his conclusory averment that the Plan Proponents misrepresented the “feasibility” of the Plan, the sole basis for revocation actually cited in the Complaint. (Complaint at ¶ 34). Indeed, confronted with the controlling legal standard for revocation under section 1144, 11 U.S.C. § 1144, adopted by the Sixth Circuit in *Tenn-Fla Partners v. First Union National Bank of Florida (In re Tenn-Fla Partners)*, 226 F.3d 746, 750 (6th Cir. 2000), and the indisputable facts established by the record in the underlying proceedings, he abandons entirely his allegations that the Plan Proponents “made specific misrepresentations to this Court and fraudulently concealed the wrongdoing” alleged in the Complaint in seeking confirmation of the Plan. (Id.).

Instead, Plaintiff comes up with a new theory, asserting that “the Debtor must have acted honestly throughout these Chapter 11 proceedings as a whole and any misconduct during these proceedings leading up to the plan proposal will result in that proposal being made in bad faith, and therefore subject to revocation.” (Opposition at 2). Although contending that “Plaintiff has

alleged that the Plan was proposed in bad faith, and was, consequently in violation of [section 1144] as a fraud upon the court” (Opposition at 3), he is unable to cite to any paragraph of the Complaint containing such allegation since it does not appear anywhere in that pleading. Even if the Complaint could somehow be construed otherwise, these newly-minted contentions simply do not state a cause of action for relief under section 1144.

B. PLAINTIFF’S THEORY FOR REVOCATION UNDER SECTION 1144 IS WITHOUT BASIS IN LAW.

In *Tenn-Fla Partners*, the Sixth Circuit expressly and unambiguously adopted the five-factor test, detailed by the Plan Administrator in his initial Memorandum in Support, setting out the elements that must be alleged and proved to maintain an action for revocation under section 1144. *See Tenn-Fla Partners*, 226 F.3d at 751 (“We agree with the analysis of the bankruptcy court with respect to the nature of the fraud required to support revocation of a confirmation order and adopt the reasoning set forth above.”). Completely disregarding that binding authority, Plaintiff asserts that he must “only allege that the Debtors acted with fraudulent intent in the bankruptcy and that the Confirmation was a result of that fraud.” (Opposition at 4). This assertion not only is contrary the law of this Circuit, it finds no support in the authorities cited by Plaintiff.

In the first of those decisions, *United States v. Kostoglou (In re Kostoglou)*, 73 B.R. 596 (Bkrcty. N.D. Ohio 1987), Judge Bodoh did not have the benefit of the Sixth Circuit’s guidance but came to much the same conclusion as the court of appeals would 13 years later regarding the nature of the fraud required to support revocation of a confirmation order under section 1144. In that case, the debtors made certain representations regarding the value of estate property securing claims of the Internal Revenue Service and other creditors in their proposed disclosure statement and plan of reorganization. Those values were substantially lower than the “book” values the

debtors had listed in the schedules they had initially filed with the court. One of the debtors testified at the confirmation hearing on the proposed plan that the “liquidation” values set out in the plan and disclosure statement, rather than the “book” values stated in the debtors’ schedules, were the appropriate values to be used in determining the secured nature of the claims of the IRS and other creditors. *Id.* at 597-98.

Following confirmation, the IRS initiated an adversary proceeding pursuant to section 1144, alleging that the debtors had “knowingly misrepresented the values of their various real estate holdings to the Court in connection with the confirmation of their Chapter 11 Plan and that the Court relied upon those misrepresentations and was thereby induced to confirm the Plan.” *Kostoglou*, 73 B.R. at 598. On the debtors’ motion to dismiss, the court held that the allegations made by the IRS stated a claim under section 1144 and overruled the motion. The court specifically found that the debtors’ statements regarding the value of their property in their disclosure statement and testimony at the confirmation hearing could be the basis of a proceeding under the statute “provided the remaining elements of Sec. 1144 are present.” *Id.* at 601. In short, *Kostoglou* stands for the unremarkable proposition that misrepresentations made to the court in connection with confirmation of a plan may be the basis for an action under section 1144. Nothing in that decision supports the proposition advanced by Plaintiff that “any misconduct” at any time during proceedings leading up to the proposal of a plan results in the proposal being made in “bad faith.”

Plaintiff’s reliance on the bankruptcy court’s decision in the *Tenn-Fla Partners* case, *First Union National Bank of Florida v. Tenn-Fla Partners (In re Tenn-Fla Partners)*, 170 B.R. 946 (Bkrcty. W.D.Tenn. 1994), is just as inexplicable. It was, in fact, the bankruptcy court that articulated the test for fraud under section 1144 that was subsequently adopted by the Sixth

Circuit, *id.* at 697, and that Plaintiff now seeks to circumvent. Consistent with that test, the bankruptcy court's findings make clear that the misrepresentations and concealments that will justify revocation under section 1144 must be directed to the court and must be made in the context of the disclosure statement and plan confirmation proceedings. *Id.* at 967-69 (finding that "the court was deceived in its decision to confirm the debtor's plan when the debtor knowingly concealed information about the true market value and willing purchasers of the debtor's sole asset", that "[t]he debtor's disclosures and plans never disclosed the true level of interest in purchasing the property", and that, as a result, "[t]he debtor misrepresented to the court at the confirmation hearing that it proposed its plan in good faith and that the debtor was in compliance with the Code's disclosure requirements"). Nothing in the decision supports Plaintiff's suggestion that allegations of fraud in connection with a previously-conducted sale of estate assets under section 363 of the Bankruptcy Code, 11 U.S.C. § 363, could possibly be the basis for an action to revoke confirmation under section 1144.

Plaintiff's unexplained citations to *Farley v. Coffee Cupboard, Inc. (In re Coffee Cupboard, Inc.)*, 119 B.R. 14 (E.D.N.Y. 1990), are even more perplexing since that decision did not involve an attempt to revoke a confirmed plan; rather, it addressed a creditor's motion to reopen a chapter 11 case and to convert the case to one under chapter 7 pursuant to section 1112 of the Bankruptcy Code. 11 U.S.C. § 1112. Indeed, in that case, the district court found that the bankruptcy court erred in refusing to consider the motion precisely because, under the circumstances alleged and in light of the relief requested, it did not constitute a collateral attack on the confirmation order in derogation of section 1144. 119 B.R. at 19-20. The decision has nothing to say about the elements of a claim under section 1144 and certainly does not stand for

the proposition that the “fraud” that may support a claim under that statute encompasses “the entire bankruptcy proceeding.” (Opposition at 4).

In sum, Plaintiff has not cited to any authority that in any way endorses or lends credence to his misinterpretation of section 1144. Nor do any of the decisions he references support his assertions that the underlying chapter 11 proceedings were “initiated for an unlawful purpose,” “unlawful from [their] inception,” and “maintained for an unlawful purpose.” (Opposition at 6). Those claims, even when read generously, appear to confuse the “good faith” required for confirmation of a plan under section 1129(a)(3), 11 U.S.C. § 1129(a)(3), and that which is a prerequisite to filing a chapter 11 petition in the first instance. *See Pacific First Bank v. Boulders on the River, Inc. (In re Boulders on the River, Inc.)*, 164 B.R. 99, 103-104 (9th Cir. B.A.P. 1994) (discussing legal distinction between “good faith” standard for dismissal of petition under section 1112(b), 11 U.S.C. § 1112(b), and that for plan confirmation under section 1129(a)(3)).

Moreover, Plaintiff never explains in his Opposition how those proceedings were, in any respect, “unlawful” under the Bankruptcy Code or even what that term is intended to mean. Nothing in the operative factual allegations referenced by Plaintiff in support of these assertions would, if found true, establish the “illegality” of the Debtors’ chapter 11 cases. Neither the Complaint nor the Opposition contains a single citation to the terms of the Confirmed Plan, much less suggests how any term of the Plan “advanced an unlawful scheme.” Even if it was alleged in the Complaint that the Plan was not proposed in “good faith” – which it is not – and if the authorities cited by Plaintiff had anything to say about the “legality” of chapter 11 proceedings as a condition of plan confirmation – which they do not – neither the record in the underlying proceedings nor the allegations pleaded by Plaintiff establish the “unlawfulness” of the Debtors’

chapter 11 cases or the proceedings conducted by this Court for the past seven years. Plaintiff's attempt to expand the scope of section 1144 beyond its plain language and in a way contrary to binding case law must be rejected.

C. THE COURT'S PRIOR DECISIONS IN THE DEBTORS' CHAPTER 11 PROCEEDINGS ARE DIRECTLY RELEVANT TO AND MAY BE CONSIDERED IN EVALUATING THE MERITS OF PLAINTIFF'S CLAIM UNDER SECTION 1144.

Plaintiff also complains that the Plan Administrator bases his Motion on the denial of the various motions filed by William Maloof ("Maloof") in the two and a half years prior to the entry of the Confirmation Order. Plaintiff mischaracterizes the Plan Administrator's references to the Court's rulings on those motions, contending that the Plan Administrator "is claiming that because Maloof never proved his allegations, the allegations are without merit." (Opposition at 5). No such "claim" appears anywhere in the Plan Administrator's initial Memorandum in Support. Rather, Maloof's campaign to undermine and undo the Debtors' chapter 11 cases, predicated on the very same allegations as are contained in the Complaint, is referenced for the purpose of showing that "there could never be a finding that the Plan Proponents 'concealed' the allegations of wrongdoing from the Court or that, as a consequence of such 'non-disclosure,' the Court entered the Confirmation Order." (Memorandum in Support at 18). Consistent with his abandonment of the causes of action set out in the Complaint, Plaintiff never contests this assertion in his Opposition or otherwise disputes that, in light of the Court's denial of Maloof's objections to the Disclosure Statement, the Plan Proponents had no duty to "disclose" the allegations made in the Second and Third Motions to Vacate and reiterated here.

Furthermore, the history of the Debtors' chapter 11 cases is plainly relevant to the new theory of revocation asserted in the Opposition. It is impossible to comprehend how the Plan Proponents could have acted with "fraudulent intent" or in "bad faith" in proposing the Plan

when, at every turn in six years of proceedings, the actions of the Debtors had been approved and every assertion of fraud and wrongdoing had been rejected by the Court.² At no point in those proceedings was the Court's jurisdiction over the Debtors, their assets or their chapter 11 cases contested and found wanting. Under these circumstances, the Plan Proponents plainly were entitled to rely upon the "legality" of the chapter 11 cases in proposing and seeking confirmation of the Plan, particularly when the Court itself had found that Maloof's attempts to challenge prior proceedings and rulings were barred under the doctrines of finality and law of the case. (See B.R. 3037: Memorandum of Opinion and Order at 6-7; B.R. 3253: Memorandum of Opinion and Order at 9). Plaintiff's unsupported and belated assertions that the Plan had not been proposed "in good faith" because of the supposedly "unlawful" purpose underlying the initiation of the cases can and should be disregarded by the Court in light of this record. *See Texas Extrusion Corp. v. Lockheed Corp. (In Matter of Texas Extrusion Corp.)*, 844 F.2d 1142, 1160 (5th Cir.) (bankruptcy court properly exercised its discretion in discounting claim that plan "was part and parcel of an alleged conspiracy" to drive the debtor out of business in violation of anti-trust laws and finding that plan was proposed in good faith), *cert. denied*, 488 U.S. 926 (1988).

Plaintiff, in essence, wishes to disregard six years of proceedings and decisions by this Court and, when those decisions were appealed, by the District Court and the Sixth Circuit Court of Appeals, treating section 1144 as an invitation to conduct a "fishing expedition" into matters long ago examined and decided. One need look no further than Plaintiff's conclusory averment repeating the discredited canard that the Debtors were "under the complete and wrongful domination and control of the Bank Group" following the filing of the Involuntary Petition

² Plaintiff's outrageous and unpleaded assertion that "[t]he Debtors' resistance to the [Maloof] Motions was fraudulent conduct in that they were made with the fraudulent intent of preventing the Court from reaching the merits of the allegations" (Opposition at 3) is simply absurd on the face of this record.

(Complaint at ¶ 20) – an allegation that was exhaustively investigated and rejected by the Examiner – to recognize that Plaintiff views this action as an opportunity to challenge and relitigate virtually every aspect of the Debtors’ chapter 11 cases. Nothing in the language or jurisprudence of section 1144 suggests that an action for revoking confirmation can or should be a vehicle for contesting the conduct of a debtor’s “entire bankruptcy proceeding.” (Opposition at 4). Because that is exactly what Plaintiff seeks to do, rather than allege and address the recognized and essential elements of a claim under section 1144, the Complaint should be dismissed.

For the foregoing reasons and authorities cited, as well as those set forth in his initial Memorandum in Support, the Plan Administrator respectfully requests that the Court grant his motion by entering an order dismissing the Complaint and grant the Plan Administrator such other and further relief as the Court finds to be just and equitable.

Dated: May 18, 2009

Respectfully submitted,

/s/ Mark A. Phillips

Mark A. Phillips (Ohio # 0047347)
Stuart A. Laven, Jr. (Ohio # 0071110)
Matthew J. Samsa (Ohio # 0084256)
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
200 Public Square, Suite 2300
Cleveland, OH 44114
Phone: (216) 363-4500
Fax: (216) 363-4588
Email: mphillips@beneschlaw.com
slaven@beneschlaw.com
msamsa@beneschlaw.com

Attorneys for Mark Uhrich, Plan Administrator
of the Consolidated Liquidating Estate of
Level Propane Gases, Inc. et al.

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2009, a copy of the foregoing Reply Memorandum In Support of Defendant's Motion to Dismiss Complaint of Plaintiff Bill Wilhelm was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Mark A. Phillips _____
One of the Attorneys for Mark Uhrich, Plan
Administrator of the Consolidated Liquidating
Estate of Level Propane Gases, Inc., et al.