

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

In Re:)	Case No. 02-16172
Level Propane, Gases, Inc., et. al.)	
Debtors.)	Ch. 11
)	
*****)	Hon. Randolph Baxter
Bill Wilhelm)	
Plaintiff)	Adv. Pro. Case No. 09-1116
)	
Vs.)	
)	
Mark Uhrich, Plan Administrator)	
of the Consolidated Estate of)	
Level Propane Gases, Inc.)	
Defendant)	

**AMENDED OPPOSITION OF BILL WILHELM TO
DEFENDANT'S MOTION TO DISMISS**

Now comes Bill Wilhelm, by and through counsel undersigned, and submits his Amended Opposition to Defendant's Motion to Dismiss. He opposes the Motion to Dismiss for the reasons set forth below.

INTRODUCTORY STATEMENT

The Defendant has moved to Dismiss the above-captioned Complaint to Revoke Confirmation of Plan. He has argued that because William Maloof's motions to revisit orders of this Court have been denied for want of evidence, this Plaintiff's Complaint fails to state a cause of action. A motion made pursuant to R. 12(b)(6) will prevail only when the allegations in a complaint do not make out a cause of action. This complaint and the cause of action that is stated

herein belong to this Plaintiff, Bill Wilhelm, and to no one else. Bill Wilhelm's allegations stand on their own to make out this cause of action under 11 U.S. C. Sec. 1144. As argued below, the Defendant's Motion to Dismiss the complaint can not be premised on argument addressed to the pleading or proof of others.

LAW AND ARGUMENT

The Defendant seeks a dismissal of this Complaint to Revoke Confirmation on the basis that the allegations set out in the Complaint do not state a cause of action under R. 12(b)(6). The Plaintiff will argue below that the Defendant, in seeking this dismissal, regards evidence and allegation as one and the same, when the rule is well established that for purposes of a Motion to Dismiss, all of the allegations set out in the complaint are to be taken as true, as well as all reasonable inferences that can be taken from those allegations. The Defendant would also have the Court confine its inquiry into whether the Debtors made a specific misrepresentation in the plan proposal or in the hearings on the proposed plan. As the Plaintiff argues below, the statute, 11 U.S.C. Sec. 1144 and the case law interpreting it, make it clear that the Debtor must have acted honestly throughout the Chapter 11 proceedings as a whole and any misconduct during the proceedings leading up to the plan proposal will result in that proposal being made in bad faith, and therefore subject to revocation.

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THE CONCEALMENTS OF THE DEBTORS WERE MATERIAL TO THE CONFIRMATION PROCEEDINGS.

Contrary to the Defendant's assertion, the facts alleged to have been concealed were material to the Confirmation Proceedings, *In Re: Kostoglou* 73 B.R. 596 (N.D.O., 1987), *In Re: Coffee Cupboard* 119 B.R. 14 (E.D.N.Y, 1990), *In Re: Tenn-Fla Partners* 170 B.R. 946 (W.D.

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Tn., 1994). That the Debtors sought the Court's Confirmation based on a plan that advanced an unlawful scheme is sufficient basis to maintain an action under 11 U.S.C. Sec. 1144. The Plaintiff has alleged that the Plan was proposed in bad faith, and was, consequently in violation of 11 U.S.C. Sec. 1144 as a fraud upon the court. The Plaintiff alleges that the Debtors' Plan was proposed in furtherance of the fraudulent filing and maintenance of the Chapter 11 proceeding. As such, the Plan was impossible to approve because it was proposed in bad faith furtherance of the fraud alleged in paragraphs 9-30 of the Complaint.

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The Court's Decisions Regarding Motions Made by William Maloof have no Bearing on the Merits of this Plaintiff's Allegations.

The Defendant argues strenuous from the history of Maloof's motion practice, that the Court has heard and rejected the allegations in the Complaint. The Pleadings to which the Defendant refers, were Motions to Vacate filed by William Maloof. This Court decided these Motions to Vacate which required clear and convincing evidence of wrongdoing before an analysis of the sufficiency of any allegations was even reached. In this Court's Opinion denying Maloof's September, 2007, Motion to Vacate (B.R. 3253) it decided whether the evidence submitted provided clear and convincing proof of fraud upon the Court. In deciding on the evidence, it could never reach whether the allegations the evidence was submitted to support set out such fraud. The Debtors' resistance to the Motions was fraudulent conduct in that they were made with the fraudulent intent of preventing the Court from reaching the merits of the allegations. The focus of all of the Motions was evidentiary: the allegations were never approached. Even the Court's language cited by the Defendant bears this out: the submissions "offer[ed] no support for [Maloof's] vague conspiratorial allegations, did "not lead to a conclusion that the Debtors' going concern value was purposely deflated" and "failed to

demonstrate fraud on the Court.” Similarly, when this Court denied Maloof’s June, 2008, R.60(b)(2) Motion (B.R. 3388) it did so for want of jurisdiction; Maloof’s fraud allegations were not addressed. Finally, Maloof’s Objection to the Plan was denied only because it was untimely, not on the basis of any of its allegations (B.R. 3471.)

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The Plaintiff states a Cause of Action Under 11 U.S.C. Sec. 1144.

Under 1144, the Plaintiff stands on wholly different footing: his complaint must, at the outset, only allege that the Debtors acted with fraudulent intent in the bankruptcy and that the Confirmation was a result of that fraud. It is by no means limited to fraud in the hearings leading to confirmation of the plan, but to the entire bankruptcy, *Kostoglou, supra, Coffee Cupboard, supra*. In *Kostoglou, supra*, the Court was aware of the existence of the real estate upon which the bankruptcy turned, the values assigned to the real estate and of the market in which that real estate was offered or would be offered for sale 76 B.R. at 599-600. The test was whether the confirmation of the plan was procured by fraud upon the Court. If the Court so finds, the confirmation of the plan must be revoked. *Kostoglou, supra, In Re: Tri-Cran* 98 B.R. 609 (D. Mass., 1989.)

In *Tenn-Fla Partners, supra*, upon which the Defendant relies exclusively, the Debtors acted with fraudulent intent when they parked offers on the apartment complex that was the sole asset in the estate so that the bondholders would be forced to discount their bonds as part of their approval of the plan, when the actual offers the Debtors had solicited would have yielded them, the bondholders, full payment. Here, the Plaintiff alleges that the going-concern assets of Level Propane were directed to Horizon Propane by means of customer concealment and customer check concealment, Complaint at 26-29, leaving no going concern to reorganize under any plan,

only purported causes of action to liquidate. The injury to the creditors and other parties in interest, left with payment of pennies on the dollar rather than the ability to do business with a reorganized enterprise is patent. No real distinction can possibly or plausibly be articulated between the conduct of the Debtors in *Tenn-Fla, supra*, who parked the offers to the detriment of creditors until after their fraudulent plan was confirmed, and the Debtors here, who directed the assets to a participant in their scheme before the Plan was even proposed, so that no going concern was present in the estate for the benefit of any creditor. The only difference is timing (before the plan as opposed to after the plan), with no difference in the achievement of the intended outcome.

In conclusion, the Defendant is careful to suppress the distinction between proof and allegation. This suppression is essential to their argument since he is claiming that because Maloof never proved his allegations, the allegations were without merit. Here, however, and for this purpose, the allegations set out in the complaint must be taken as true, whatever the state of the proof. Taken as true, the allegations set out a cause of action under 11 U.S.C. Sec. 1144, describing a fraudulent scheme to direct the going concern assets of the estate to a participant in the scheme as a fraud on the court and thus to the detriment of all the remaining parties in the proceeding.

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THE DEBTORS FRAUDULENTLY CONCEALED THEIR INTENTION TO DIRECT THE GOING CONCERN ASSETS OF THE ESTATE TO A PRE-SELECTED PARTY TO THE DETRIMENT OF THE CREDITORS AND OTHER PARTIES IN INTEREST.

The observation made by the court in condemning the conduct of the Debtors in *Tenn-Fla, supra*, applies equally to the Debtors whose plan is challenged here:

“The debtor can not argue legitimately that a chapter 11 trustee would have pursued such a course. As two commentators have observed:

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The duty of loyalty and good faith forbids directors and other business operators from using their positions of trust and control over the rights of other parties to further their own private interests, either by usurping opportunities, holding undisclosed conflicts or otherwise exploiting their positions. Raymond T. Nimmer & Richard B. Feinberg, Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees And Exclusivity, 6 BANKR. DEV. J. 1, 35 (1989).

The 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," 170 BR at 968-969, emphasis supplied.

Here, the Debtors, controlled by the Bank Group, proposed a plan that advanced their interests at the expense of all the other parties to the bankruptcy, in that it gave the appearance of closure to a proceeding that they knew was unlawful from its inception. As a consequence, the Debtors misrepresented that they proposed their plan, designed to put the veil of legitimacy on their scheme, in good faith. In his Motion, the Defendant attempts to wrench the Plan out of it's context in order to purge the Debtors' conduct of the taint of fraud that has infected these entire proceedings.

The Plaintiff has alleged these proceedings were initiated for an unlawful purpose, Complaint at Paragraphs 18-20, maintained for an unlawful purpose and that frauds were maintained by those in control of the Debtors in order to deliver the assets of the estate to the hands their co-conspirators, Complaint at 22-26. These misrepresentations are more than sufficient to establish that the plan was not proposed in good faith. It is clear, from the unparsed language of all the cases that address whether a plan is proposed in good faith, that the proceedings in which the plan is proposed must themselves be lawful, see e.g. *Kostoglou, supra*, *Coffee Cupboard, supra*, and that the conduct of the Debtors both during the proceedings and while Debtor is under the jurisdiction of this Court must be lawful. The Debtors, as Debtors in

Possession under Chapter 11 of the Code, are fiduciaries for all the creditors and others parties in interest. *In re Giguare* 165 B.R. 531, 534-535 (D.R.I., 1994).

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**PLAINTIFF STATED CLAIMS AS TO THE ORDERS MADE PRIOR TO THE
CONFIRMATION OF THE PLAN**

In his Complaint, the Plaintiff made the claims relating to the prior orders of this court well aware, and with the expectation, that these claims will rise or fall with his Complaint to Revoke the Confirmation of the Plan. The Defendant is well aware that the pleading form chosen, a complaint to enjoin enforcement a judgment, is recognized by the Federal R. 60(d), which provides that "This [R.60, F.R.C.P.] rule does not limit a court's power to: (1) entertain *an independent action to relieve a party from a judgment, order, or proceeding,*" R. 60(d)(1), F.R.C.P., emphasis supplied, which is used when, for whatever reason, a Motion to Vacate Judgment is either unavailable or inappropriate. This method, an independent action, authorized by Court Rule, is the very means used in the Complaint.

The Defendant is also well aware that these additional counts were brought under the doctrine articulated in *United States v. Throckmorton* 98 U.S. 61, 67 (1878), the case articulating the doctrine recognized by R. 60(d), see also *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir., 1998). If the Confirmation is revoked, then these additional counts, which depend on the same fact pattern as the Complaint brought under 11 U.S.C. Sec 1144, can be expeditiously heard. If the Plaintiff in this case prevails, and revokes the Confirmation, the revocation will be because these bankruptcy proceedings were wholly infected by fraud, the same fraud by which each of these other Orders were procured. It would serve little purpose to bring these counts in a separate filing after the Confirmation is revoked and go through the same

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evidence as that which went to prove the revocation. These counts were included here solely for the purpose of judicial economy. The Defendant is well aware of this and his pleading, which evinces such disgust that the Plaintiff would bring so clumsy a pleading to court, is at best disingenuous. Such measured disgust is reserved by those who must defend the indefensible. If indeed the fraudulently procured confirmation of plan bars these actions, then this court is certainly capable of fashioning a remedy consistent with both justice and the plain facts.

CONCLUSION

In conclusion, for the reasons set forth above, the Plaintiff urges this Court to deny the Defendant's unfounded Motion to Dismiss. It is clear from the Defendant's argument that he would have this Court decide this not on the allegations raised in the Complaint, as a Motion to Dismiss must be decided, but on the basis of motions filed months and years before by a third party, supported by evidence this Plaintiff has not presented and thus cannot be in issue.

Respectfully Submitted,

/s/ Kreig J. Brusnahan
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SERVICE

I hereby certify that on this 19th day of May, 2009, the foregoing was filed electronically.

Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Parties may access this filing through the Court's system.

/s/ Kreig J. Brusnahan

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