

**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.)	
)	Judge Randolph Baxter
)	
)	Adversary Proceeding No. 09-01118
)	
MAXUS CAPITAL GROUP, LLC,)	
)	
Plaintiff,)	
)	
v.)	
)	
MARK UHRICH, PLAN ADMINISTRATOR,)	
)	
Defendant.)	

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION
TO DISMISS COMPLAINT OF PLAINTIFF MAXUS CAPITAL GROUP, LLC**

In its opposition to the Motion to Dismiss of defendant Mark Uhrich, the Plan Administrator of the Consolidated Estate of the Debtors (the “Plan Administrator”), plaintiff Maxus Capital Group, LLC (“Plaintiff”) mischaracterizes both the law applicable to its claim under section 1144 of the Bankruptcy Code, 11 U.S.C. § 1144, and the Plan Administrator’s arguments demonstrating that Plaintiff’s allegations fail to state a claim thereunder. In the process, Plaintiff loses sight of the allegations contained in its own pleading and is reduced to arguing that it has stated a claim because it alleges that “fraud infected the entire bankruptcy proceeding.” As the Plan Administrator shows below, this characterization of the Plaintiff’s

“claim” only reinforces that it has filed this action for the purpose of challenging and re-litigating conduct and events that allegedly occurred more than five years ago 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 STATE A CLAIM FOR REVOCATION OF THE CONFIRMATION ORDER UNDER SECTION 1144.

In *Tenn-Fla Partners v. First Union National Bank of Florida (In re Tenn-Fla Partners)*, 226 F.3d 746 (6th Cir. 2000), 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 of confirmation under section 1144. *Id.* 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.”). As shown in the Memorandum, Plaintiff’s allegations that the Plan Proponents “procured” the Confirmation Order “by the submission of a materially defective disclosure statement” that “was misleading and incomplete” because it did not disclose the alleged fraudulent activities of John Verbos and Richard Anter prior to the entry of the Level Sale Order in June 2003 (see Complaint at ¶¶ 66-75) do not state a claim for relief under section 1144 and the *Tenn-Fla Partners* test. (See Memorandum in Support at 14-17). Confronted with this analysis, Plaintiff makes essentially two arguments in which it misconstrues the Plan Administrator’s arguments and mischaracterizes applicable law.

Plaintiff first complains that, because of his references to the tortuous procedural history of the underlying chapter 11 cases and, in particular, the various motions and objections filed by Maloof, the Plan Administrator’s “central arguments are really ones of collateral estoppel and res

judicata.” (Opposition at 2). No such contentions appear anywhere in the Memorandum in Support with respect to Plaintiff’s purported claim under section 1144. Instead, as the Plan Administrator plainly argues, the record in the underlying proceedings negates any allegation or inference that the Plan Proponents had the requisite “actual fraudulent intent” to mislead the Court by “omitting” from the Disclosure Statement any reference to the “conspiracy” and “check concealment scheme” of Verbos and Anter when the Court clearly knew of the alleged conspiracy as a result of Maloof’s Second and Third Motions to Vacate and had, in fact, no “duty to disclose” such matters when the Court had rejected Maloof’s objections to the Disclosure Statement predicated on those Motions.

Plaintiff asserts in apparent response that just because Maloof was unable to prove his allegations doesn’t mean that Plaintiff will be unable to do so. (Opposition at 3). This argument, however, simply begs the question, since the issue is whether the Plan Proponents intentionally concealed material information from the Court in an effort to induce the entry of the Confirmation Order. *See Tenn-Fla Partners v. First Union National Bank of Florida (In re Tenn-Fla Partners)*, 228 B.R. 720, 731 (W.D.Tenn. 1999), *aff’d*, 226 F.3d 746 (6th Cir. 2000). Based on the record in the underlying proceedings,¹ there can be no doubt that the Court knew of the very set of “facts” alleged in the Complaint at the time it approved the Disclosure Statement and entered the Confirmation Order. Nothing was concealed from the Court or, for that matter, any party in interest when the facts alleged had been spread upon the public record in the Debtors’ cases by Maloof and specifically raised in the context of the disclosure statement proceedings. The Court’s determination that those matters need not have been recited in the

¹ Plaintiff contends that it would be “improper” to dismiss the Complaint based on judicial notice of this record but fails to reference any authority supporting this proposition or disputing the decisions cited by the Plan Administrator showing that consideration of the record in determining the Motion is entirely appropriate.

Disclosure Statement cannot now somehow be transformed into an intentional fraudulent act on the part of the Plan Proponents, particularly when, at every turn in six years of proceedings, the actions of the Debtors had received judicial approval and every assertion of fraud and wrongdoing had been rejected by the Court.

Second, Plaintiff appears to contend that it is sufficient under section 1144 to allege that “fraud infected the entire bankruptcy proceeding,” a phrase it repeats throughout the Opposition. Plaintiff argues that, because the “Complaint alleges that officers of the debtor in possession engaged in a scheme to steal customer checks and take other actions that had a catastrophic effect on the value of the debtor” (Opposition at 7), it has stated a claim under the statute since “the court’s reliance on the fraud was induced, established, and embodied in the confirmation order.” (Id. at 5). In essence, Plaintiff would appear to maintain that if a “fraud on the court” is alleged to have occurred at some point in a chapter 11 proceeding, confirmation of a plan is impossible.

Nothing in the language of or jurisprudence under section 1144, including *Tenn-Fla Partners*, supports this proposition or comes close to indicating that an action for revoking confirmation can or should be a vehicle for contesting the conduct of a debtor’s “entire bankruptcy proceeding.” Consistent with the plain language of the statute, the standard set out in *Tenn-Fla Partners* is quite specific: the intentional misrepresentation or concealment alleged must have been regarding and in connection with the plan proponent’s compliance with section 1129 of the Bankruptcy Code. 226 F.3d at 750. None of the other decisions cited by Plaintiff suggest differently. See *United States v. Kostoglou (In re Kostoglou)*, 73 B.R. 596, 601 (Bkrcty. N.D. Ohio 1987) (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

statute “provided the remaining elements of Sec. 1144 are present”);² *Official Comm. of Unsecured Creditors v. H.B. Michelson (In re H.B. Michelson)*, 141 B.R. 715, 730 (Bkrctcy. E.D.Cal. 1992) (failure to disclose federal mail fraud indictment of reorganization manager in disclosure statement and confirmation hearing constituted material fact that would have been fatal conclusion that debtor’s plan met feasibility requirement of 11 U.S.C. § 1129(a)(11)). Plaintiff has, in short, failed to cite to any authority that in any way endorses or lends credence to his misinterpretation of section 1144.

The alleged malfeasance of Verbos and Anter in 2002 and 2003, even if it could be construed as having somehow resulted in a “fraud upon the court” in connection with some other order entered by the Court during that period,³ did not “procure” the Confirmation Order in 2008. Plaintiff’s “bootstrap” argument would turn section 1144 into a platform by which a disgruntled creditor, dissatisfied with the outcome in a case, could challenge and relitigate virtually any and every aspect of a debtor’s bankruptcy proceeding based on allegations that they were “infected” by fraud, turning the statute into an invitation to conduct a “fishing expedition” into matters long ago contested and decided. This is contrary to the plain and straightforward

² Plaintiff quotes *Kostoglou* for the proposition that section 1144 “encompasses any action in a bankruptcy proceeding by which a party obtains confirmation of a Plan by deceptive practices.” (Opposition at 5). Not only does Plaintiff’s quotation misleading leave off the phrase “with deceptive intent” from this quotation, it also ignores that what the court was referring to was the meaning of “fraud” as used in the statute in rejecting the debtors’ argument that the fraud alleged in that case was “intrinsic” rather than “extrinsic.” *Id.* at 599.

³ The Plan Administrator has already demonstrated the insufficiency of Plaintiff’s allegations in this regard. (See Memorandum in Support at 17-19). Plaintiff’s only rejoinder is to point to the facts at issue in the decisions establishing the controlling elements for a claim of “fraud on the court” in the Sixth Circuit. (Opposition at 5, n. 1). This observation conveniently ignores that, in the portion of the district court’s opinion in *Tenn-Fla Parnters* quoted by Plaintiff in the sentence preceding this footnote, the court cited to *Demjanuk* as controlling Sixth Circuit authority on the issue whether the withholding of information could be the basis for a finding of fraud on the court. 229 B.R. at 731, n. 8.

directive of the statute that the Court may revoke an order of confirmation “if and only if such order was procured by fraud.” 11 U.S.C. § 1144. 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.

B. PLAINTIFF HAS FAILED TO STATE A CLAIM WITH RESPECT TO ITS REQUEST THAT THE COURT DECLARE THE GLOBAL SETTLEMENT ORDERS AND AGREEMENT “NULL AND VOID.”

In its Opposition, Plaintiff does not respond to that aspect of the Motion addressing and demonstrating the Complaint’s failure to state a claim for relief from the Global Settlement Orders and Global Settlement Agreement. (See Memorandum in Support at 17-20). Indeed, Plaintiff’s prayer that those Orders and that Agreement be adjudicated “null and void” is not even mentioned in the Opposition. Instead, Plaintiff mischaracterizes the Plan Administrator’s argument that the Complaint’s allegations fail to satisfy the elements required to state a claim for fraud on the court justifying such relief, treating that argument as being directed to its section 1144 claim for revocation. (See Opposition at 5). In short, the Plan Administrator’s request that Plaintiff’s request for relief from the Global Settlement Orders and Global Settlement Agreement be dismissed stands unopposed and should therefore be granted.

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 20, 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 20, 2009, a copy of the foregoing Reply Memorandum In Support of Defendant's Motion to Dismiss Complaint of Plaintiff Maxus Capital Group, LLC 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.