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

In re:	)	Chapter 11
	)	
LEVEL PROPANE GASES, INC., *et al.*	)	Case No. 02-16172
	)	Jointly Administered
Debtors.	)	
	)	Randolph Baxter
	)	
____________________________________	)	Adversary Proceeding No. 09-01118
	)	
MAXUS CAPITAL GROUP, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MARK UHRICH, PLAN ADMINSTRATOR,	)	
	)	
Defendant.	)	

DEFENDANT'S BRIEF IN OPPOSITION TO MOTION OF THE CERTIFIED CLASS OF OHIO RESIDENTIAL CUSTOMERS OF LEVEL PROPANE GASES, INC. TO INTERVENE

Defendant Mark Uhrich, the Plan Administrator for the Consolidated Estate of Level Propane Gases, Inc., and its affiliated debtors and former debtors in possession in the above-captioned chapter 11 cases (the "Plan Administrator"), opposes the motion of the Certified Class of Ohio Residential Customers of Level Propane Gases, Inc. (the "Certified Class") to intervene (the "Motion") in this adversary proceeding. In that the Certified Class has failed to comply with the requirements of Fed.R.Civ.P. 24(c), the Plan Administrator respectfully moves this Court for entry of an order denying the relief requested in the Motion. As set forth in greater detail below, the relief requested in the Motion should be denied for failure to comply with the requirements of Fed.R.Civ.P. 24(c).

Federal Rule of Civil Procedure 24(c) provides that:

> A motion to intervene **must** be served on the parties as provided in Rule 5. The motion **must** state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Fed.R.Civ.P. 24(c) (emphasis supplied). "Compliance with these requirements is mandatory." 6 *Moore's Federal Practice*, § 24.20 (Matthew Bender 3d ed.). Their purpose is clear:

> [A] district court will be unable to evaluate a motion to intervene, and the existing parties will be unable to make a meaningful response to the motion, unless they know exactly what claims or defenses the movant proposes to bring to the lawsuit. A proposed pleading is, therefore, an essential part of the motion.

Id. *Cf. Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 314 (6th Cir. 2005) (district court abused its discretion in denying motion to intervene based on failure to attach pleading where motion alleged claim, pleading was subsequently attached to motion for relief from judgment, and no party claimed prejudice from failure).

The Certified Class has failed to comply with the requirements of Rule 24(c) in their entirety. The Certified Class did not serve a copy of the Motion on the Plan Administrator pursuant to Fed.R.Civ.P. 5. The certificate of service appended to the Motion states merely that "[n]otice of this filing will be sent to all parties by operation of the Court's electronic filing system." However, at the time the Motion was filed on April 6, 2009, electronic notice would not have been sent to the Plan Administrator since his counsel had yet to enter an appearance in this proceeding. Indeed, the electronic notice received by the Certified Class upon filing the Motion would have expressly indicated that notice would **not** be mailed electronically to the Plan Administrator. The Certified Class plainly knew that the Plan Administrator never received service of the Motion. As a result, the purported service on "all parties" was ineffective. *See*

Fed.R.Civ.P. 5(b)(E) (service by electronic means "is not effective if the serving party learns that it did not reach the person to be served").

Nor did the Certified Class attach or otherwise file a proposed pleading with the Motion. A motion to intervene "may not just 'adopt' the pleadings of an original party, nor may it merely describe a future pleading. . . ." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 595 (7th Cir. 1993) (quoting *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1993)). Even under the "permissive" approach discussed by the court in *Providence Baptist Church*,[1] the Certified Class's disregard for the Rule's requirements must be considered fatal to the Motion since the Certified Class fails to articulate the basis for the claim or claims it wishes to allege in this proceeding. It merely asserts that in addition to seeking revocation of confirmation – the relief already claimed by the existing plaintiff – it "intends to seek relief as to the restoration of its class settlement that Maxus cannot possibly seek" and that the Certified Class has a "$20 million claim[.]" (Motion at pp. 2 and 4). At no point does the Certified Class identify the "class settlement" it claims to be at issue. No factual or legal basis for the relief it purports to seek is alleged or can be discerned from its vague and conclusory assertions. The Court has no way of telling whether the Certified Class can even state a valid, cognizable claim for relief, a prerequisite for intervention. *See Solien v. Misc. Drivers & Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir.), *cert. denied sub nom.*, 403 U.S. 905 (1971); *Diehl v. United States*, 438

[1] In *Providence Baptist Church*, the court identifies a split among the circuits in their approach to enforcement of Rule 24(c) and finds that a majority of the circuits (4 to 3) favor "a permissive interpretation of the rule." 425 F.3d at 313-14. At no point, however, does the court state that it is adopting such interpretation; rather, it merely concludes that "[t]he district court's exacting application of Rule 24(c) is not in accord with the jurisprudence of a majority of the Circuits, which favor a permissive approach, or with the rationale applied by other circuits to approve strict enforcement of Rule 24(c) in some circumstances. . . ." *Id.* at 314-15.

F.2d 705, 7ll (5th Cir.), *cert. denied*, 396 U.S. 959 (1969); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 455 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969).

These same deficiencies prevent the Court from determining that the Certified Class possesses a "significant legal interest" that might possibly be impaired absent intervention. As recognized in the authority relied upon by the Certified Class, "[t]he inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). It is impossible to conclude that the legal interest asserted by the Certified Class even exists, much less that such interest is "substantial," when the only facts alleged by the Certified Class in the Motion are that it at one time settled an unspecified claim.

Nor is it possible to understand how such "interest," if it exists, could be impaired based on the generalized assertions contained in the Motion. The Certified Class never explains or offers authority in support of its bald assertion that unless the confirmation order entered by this Court on October 9, 2008, is revoked, that the Certified Class will be left "without recourse" because "it cannot appeal a decision to which it is not a party." (Motion at p. 4). Without knowing, at the very least, to what "settlement" and what "fraud" the Certified Class is referring,[2] this assertion is simply incomprehensible and cannot even be addressed as a legal proposition. The burden on the Certified Class with respect to the "impairment" element of Rule 24(a)(2) is, as it notes, minimal. The allegations in the Motion do not, however, even come close

[2] It must be noted that the Certified Class's generalized, conclusory assertions of "fraud" and "fraud on the court" do not come close to meeting the pleading requirements that it would have to meet in a complaint under Fed.R.Civ.P. 9(b). *See Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005) (plaintiff claiming fraud must allege the time, place, and content of the alleged misrepresentations; quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)).

to showing, either factually or legally, how impairment of the Certified Class's asserted legal interest is possible if intervention is denied.

Contrary to the Certified Class's contention, substantial prejudice to the Plan Administrator would arise if the Court were to grant the Motion under these circumstances. There can be no justification for exposing the Plan Administrator and the Consolidated Estate to the costs of responding to and defending against some unstated claim, the merits of which are, at this point, unknowable, and which appears wholly unrelated to the issue whether the confirmation order in these proceedings should be revoked. Nor is there any reason to subject the Plan Administrator to the burden of responding to discovery and motion practice on behalf of multiple plaintiffs on the latter issue when the Certified Class does not assert that its "interest" with respect to the revocation issue is not and would not be adequately protected by the existing plaintiff. Under these circumstances, the Certified Class's failure to comply with the requirements of Rule 24(c) cannot be treated as some mere "technical oversight" to be forgiven.

For the foregoing reasons and authorities cited, the Plan Administrator respectfully requests that the Court deny the Motion to Intervene and grant the Plan Adminstrator such other and further relief as the Court finds to be just and equitable.

Dated: May 22, 2009

Respectfully submitted,

/s/ Matthew J. Samsa

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2009, a copy of the foregoing Brief in Opposition 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/ Matthew J. Samsa
One of the Attorneys for Mark Uhrich, Plan Administrator of the Consolidated Liquidating Estate of Level Propane Gases, Inc., et al.