

**UNITED STATES BANKRUPTCY COURT
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
)	
WILLIAM H. MALOOF,)	Adversary Proceeding No. 09-01127
)	
Plaintiff,)	
)	
v.)	
)	
MARK UHRICH, PLAN ADMINSTRATOR,)	
)	
Defendant.)	

**DEFENDANT’S MEMORANDUM IN OPPOSITION
TO PLAINTIFF’S MOTION FOR
LEAVE TO FILE THIRD AMENDED COMPLAINT**

Pursuant to Fed.R.Civ.P. 15, made applicable to these proceedings by Bankr.R. 7015, defendant Mark Uhrich (the “Plan Administrator”), the plan administrator of the Consolidated Estate of Level Propane Gases, Inc. and its affiliated debtors and former debtors in possession in these jointly administered cases (collectively, the “Debtors”), hereby opposes plaintiff William H. Maloof’s (“Malooof”) Motion for Leave to File Third Amended Complaint (the “Motion”) for the following reasons:

BACKGROUND

1. Maloof filed a complaint in this adversary proceeding on April 6, 2009, asking the Court to revoke the confirmation of the confirmed plan of liquidation (the “Plan”) pursuant to section 1144 of the Bankruptcy Code and to “enjoin enforcement” of various other orders of the Court.

2. On May 7, 2009, Maloof filed an amended complaint (the “Amended Complaint”) and a second amended complaint (the “Second Amended Complaint”) with the Court. Maloof thereafter withdrew the Second Amended Complaint as improperly filed pursuant to Fed.R.Civ.P. 15 and moved the Court for leave to file the Second Amended Complaint.

3. On May 18, 2009, the Plan Administrator moved the Court to dismiss the Amended Complaint (the “Motion to Dismiss”).

4. On May 27, 2009, Maloof moved the Court for leave to file a fourth amended complaint. This filing was apparently in error and Maloof filed notices withdrawing this motion, as well as his motion for leave to file the Second Amended Complaint, the following day.

5. On May 28, 2009, Maloof filed the Motion seeking leave to file a third amended complaint (the “Third Amended Complaint”), despite the fact that no “second amended complaint” had ever been filed. The Motion asserts that leave should be granted to allow for the amendment of the pleading to allow for additional factual allegations regarding a scheme to seize control of Level Propane Gases, Inc. (“Level Propane”) that purportedly involved this Court. In support of this request, Maloof attaches certain documents that he claims constitute newly-discovered “email traffic” supposedly dating from 2000 and 2001.

6. The Amended Complaint alleges that various parties fraudulently schemed to divest Maloof of his interest in the Debtors and that alleged and unspecified fraud “infected” proceedings before the Court. The proposed Third Amended Complaint merely widens the allegations contained in the Amended Complaint to include additional participants in the fraudulent scheme, including the Court itself.

7. On June 1, 2009, Maloof filed a Motion to Recuse, seeking the recusal of this Court based on the same newly-discovered “email traffic” he cites in support of the Motion.

LAW AND ARGUMENT

8. A plaintiff may amend a complaint once as of right within 20 days after the original complaint is served and prior to the filing of a responsive pleading. Fed.R.Civ.P. 15. Otherwise, a plaintiff may only amend a complaint by leave of the court. *Id.* While “leave to amend shall be freely given when justice so requires, the ‘decision as to when ‘justice requires’ an amendment is within the discretion of the trial judge[.]” *Bush v. Camp Hosiery (In re: Metropolitan Company)* 85 B.R. 783, 785 (S.D. Ohio 1988) (citing *Martin v. Associated Truck Lines, Inc.* 801 F.2d 246, 248 (6th Cir. 1986)). Additionally, “[i]n deciding whether to allow a motion to amend, courts should consider undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment.” *Gabel v. Olsen (In re: Olsen)* 355 B.R. 649, 655 (E.D. Tenn. 2006) (citing *Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1001 (6th Cir. 2005)).

9. The Court has the discretion to deny the Motion because Maloof exhausted his right to amend without leave of the Court by filing the Amended Complaint. The Court should deny the Motion because of the futility of the Third Amended Complaint and because of Maloof’s bad faith in this proceeding and in the Debtors’ jointly administered chapter 11 cases.

10. The Third Amended Complaint is completely futile because it will not survive a motion to dismiss. The futility of an amendment is “shown when the claim or

defense is not accompanied by a showing of plausibility sufficient to present a triable issue. Thus a trial court may appropriately deny a motion to amend where the amendment would not withstand a motion to dismiss.” *Gabel v. Olsen* at 656. The *Gabel* court examined the proposed amended complaint and noted that it would be dismissed pursuant to Fed.R.C.P. 12(b)(6) due to the plaintiffs’ lack of standing to pursue their claims, and therefore the court denied leave to file the amended complaint. *Id.* at 659.

11. Likewise, the Third Amended Complaint is subject to dismissal for the reasons set forth in the Motion to Dismiss. In the Third Amended Complaint, Maloof makes no further allegations not already asserted in the Amended Complaint that could possibly fulfill the requirements for the relief requested. Although the Third Amended Complaint casts a broader net by alleging that additional parties, including the Court, planned in October 2000 to engage a scheme to “seize control of Level Propane” (Third Amended Complaint at ¶ 10), Maloof still fails to allege the elements of fraud necessary to sustain a claim to revoke confirmation of the Plan, i.e., fraud upon the court in connection with the plan confirmation process. Thus, without repeating the analysis the Plan Administrator provided in his Motion to Dismiss, the Third Amended Complaint should be denied because the same arguments set forth in the Motion to Dismiss apply with equal force to the Third Amended Complaint.

12. Furthermore, the Court should deny leave to file the Third Amended Complaint because the Motion has been made in bad faith. *See* Fed.R.Civ.P. 15, *Brumbalough v. Camelot Care Ctrs., Inc.* It is apparent that the sole reason Maloof seeks to amend his complaint to include the allegations regarding the scheme purportedly hatched in October 2000 is to provide a basis for his Motion to Recuse. At no point in his

proposed pleading does Maloof even attempt to connect this supposed scheme within any of the other acts alleged in the complaint. Indeed, his Motion makes clear that his sole interest in seeking the amendment is to have the opportunity to plead that this Court was somehow involved in the scheme. Although Maloof claims to base his new allegations on “evidence,” the materials he proffers constitute unauthenticated hearsay of the most questionable quality imaginable, having purportedly been discovered by an unidentified “colleague” of a consultant Maloof retained to examine the contents of DVD coming from a “John Caldwell.” (See Motion at Ex. 3). Absent anything coming close to admissible evidence, Maloof should not be permitted to make the speculative, scurrilous and incredible allegations he has proposed in an obvious attempt to disqualify this Court from determining this matter.

WHEREFORE, the Plan Administrator respectfully requests that the Court deny the Motion for Leave to File Third Amended Complaint and grant the Plan Administrator such other and further relief as the Court finds to be just and equitable.

Dated: Cleveland, Ohio
June 8, 2009

Respectfully submitted,

/s/ Mark A. Phillips

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, a copy of the foregoing Defendant's Memorandum In Opposition to Plaintiff's Motion for Leave to File Third Amended Complaint 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

Mark A. Phillips

One of the Attorneys for Mark Uhrich,
Plan Administrator