

**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
William H. Maloof,)	
Plaintiff)	Adv. Pro. Case No. 09-1127
)	
Vs.)	
)	
Mark Uhrich, Plan Administrator)	
of the Consolidated Estate of)	
Level Propane Gases, Inc.)	
Defendant)	

**SUPPLEMENTAL MEMORANDUM OF WILLIAM H. MALOOF IN OPPOSITION
TO DEFENDANT’S MOTION TO DISMISS**

Now comes William H. Maloof, by and through counsel undersigned, and for his Supplemental Memorandum in Opposition to Defendant’s Motion to Dismiss states as follows:

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PLAINTIFF HAS ANALYSED R.12 (b)(6) IN LIGHT OF CONTEMPORARY
CASE LAW**

As an initial matter, Plaintiff will address the argument made by the Defendant concerning R. 12(b)(6). The Defendant claims somehow that the Plaintiff relied as *Conley v. Gibson* 355 U.S. 41, 45-46 (1957), as authority for the “no set of facts” standard by which the Complaint should be judged. The Plaintiff in no respect relies on the Conley standard: he mentioned the case as the starting point for contemporary analysis of R. 12(b)(6.) The Plaintiff

goes on to discuss the current case law, including *Bell Atlantic v. Twombly* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007). The Plaintiff also provided the Court with decisions from our own Sixth Circuit, see Opposition at 3, 4, that articulate contemporary judicial requirements for statement of a claim.

Plaintiff makes no argument that the Complaint is entitled to go forward because the allegations he sets out might merely suggest some cause of action, which was the crux of the holding in *Bell Atlantic* that “Factual allegations must be enough to raise a right to relief above the speculative level,” at *id.*, but that the allegations set out in the Complaint fully articulate the basis for his claim that the Plan is subject to revocation under 11 U.S.C. §1144. The Complaint clearly sets out facts supporting his contention that the Plan was confirmed as a result of fraud. Plaintiff below will show further how, under the case law relating to §1144, that plan was the result of fraud.

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THE DEBTORS’ PLAN WAS PROCURED BY MEANS OF A KNOWING MISREPRESENTATION THAT IT WAS PROPOSED IN GOOD FAITH.

In Paragraph 33 of his Complaint, the Plaintiff alleges that the Debtors both concealed their wrongdoing and affirmatively misrepresented that the plan, filed in furtherance of an unlawful purpose, was proposed in good faith. The Defendant argued and argues from *In Re Tenn-Fla Partners* 229 B.R. 720 (W.D., Tn., 1999) that bad-faith concealment is impossible in this case because the prior motion practice had previously alerted this Court to these allegations. As Plaintiff will demonstrate below, *Tenn-Fla Partners, supra*, articulates the circumstances evidencing fraud where there has been a concealment of a material fact when 11 U.S.C. §1144 is considered, after first articulating the elements of fraud generally under 11 U.S.C. §1144, when a plan was procured under 11 U.S.C. §1129 by means of fraud.

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A Plan under Chapter 11 must be proposed in good faith, 11 U.S.C. §1129, which specifically provides that a Plan shall be confirmed “only if all of the following requirements are met . . . The plan has been proposed in good faith and not by any means forbidden by law,” 11 U.S.C. §1129(a)(3.) The Debtors affirmatively and specifically represented that the Plan was proposed in good faith, doing so to satisfy the statutory requirements, see Debtors’ Response to Shareholder’s Objection to Plan at Paragraphs 6 and 7, Dkt. No 3463. This Court specifically found that the Plan was proposed in good faith, both in affirming the Plan, at Paragraph 23 in its Findings of Fact at pg. 7, Confirmation Order of October 9, 2008, Dkt Item No. 3471. The allegations set out in the Complaint describe a course of conduct, in which the bankruptcy was initiated in bad faith and the administration of the Debtors in Possession while under the jurisdiction of this Court were consistently marred by fraudulent conduct detailed in paragraphs 9-30 of the Complaint.

The Plaintiff in Paragraph 33 of the Complaint states that the Plan was procured based on fraudulent representations to the court, misrepresentations that the initiation and maintenance of these proceedings were to adjust debt, when their true purpose was to seize control of Level Propane’s going concern. In consideration of a motion made pursuant to R. 12(b)(6), a court must take all of the allegations as true as well as all of the inferences that can be reasonably made from those allegations *Hishon, supra, Bell-Atlantic, supra*. Here, the Plaintiff has alleged that the involuntary bankruptcy was filed in bad faith and that the actual, undisclosed, object of the proceedings, the seizure of the going concern assets of Level Propane for ultimate disposition to Amerigas, was fraudulently concealed and that the plan was proposed in spite of this bad faith purpose, upon the affirmative misrepresentation that the plan was proposed in good faith. Our courts have consistently held that a good faith plan is precluded by a bankruptcy filed in bad

faith or for a bad-faith purpose. The frauds in the initiation and maintenance of these proceedings, as the Plaintiff will demonstrate below, render any Chapter 11 Plan necessarily proposed in bad faith, contrary to the requirements of §1129, and in violation of §1144, as a result of which the Confirmation of the Plan must be revoked.

The arguments advanced by the Defendant from the decision in *In Re Tenn-Fla Partners, supra*, is of no avail: the court articulated a rule responsive to the facts presented by that case concerning concealed purchase offers that were solicited then “parked” until after the Plan, which forced the bondholding creditors to discount their claims, was approved. The decision’s articulation of criteria for revocation of a confirmed plan was by no means exclusive, as even a cursory review of the case law of good faith as essential to bankruptcy reveals. In the paragraph just preceding the rule cited by the Defendant, the *Tenn-Fla* court articulated the fraud required for revocation of a confirmed plan: a knowing misrepresentation of fact, upon which the court intends the court to rely, which induced the court to confirm a proposed plan, which the court in fact confirmed, 229 at 730, fully set out below. A corollary, established by case law discussed below, is unequivocal that a plan proposed in furtherance of a bankruptcy filed in bad faith cannot be proposed in good faith. To represent that such a plan is proposed in good faith is a misrepresentation to the court upon which the party making that misrepresentation intends the court to rely. It necessarily follows that a plan confirmed in such circumstances, where the good faith of the proposal is misrepresented with the intention that the court on that misrepresentation of good faith is a confirmation that has been procured by fraud. This fraud need only be proven by preponderance of the evidence, *Tenn-Fla Partners, supra*.

Plaintiff has alleged both misrepresentation and fraudulent concealment. The Defendant focused on the summary of fraudulent concealment in *Tenn-Fla Partners*, when in the preceding paragraph of the opinion in *Tenn-Fla Partners* court describes fraud under §1144 as follows:

“While § 1144 does not define the term ‘fraud,’ ‘fraud on the court’ has been defined as ‘a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.’ *Harbold v. Commissioner*, 51 F.3d 618, 622 (6th Cir.1995) (internal quotations and citations omitted). In the context of revoking an order of confirmation under § 1144, this can be restated as requiring:

- (1) a representation by the debtor regarding compliance with § 1129;
- (2) which was materially false;
- (3) that was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth;
- (4) that was made to induce the court to rely upon it;
- (5) that the court did rely upon; and
- (6) that as a consequence of such reliance, the court entered the confirmation order.

See In re Longardner & Assocs., Inc., 855 F.2d at 462 n. 6. (chapter 13); *Perdido Motel Group*, 142 B.R. at 464, 229 at 730.

The Debtors misrepresented that they proposed the plan in good faith and that the initial involuntary petition was filed in good faith. Taking the analysis in *Tenn-Fla Partners* by steps, the Debtors (1) made a representation regarding compliance with §1129. This representation was that the plan was made in good faith and that the proceedings leading to the plan were lawful. (2) The representation was materially false. The plan was not proposed in good faith and the proceedings leading to the plan, that is, the initial filing and the conduct of the Debtors’ affairs, particularly with respect to the management and sale of the going concern assets of Level Propane Gases, Inc. and the “Propane Debtors” were not in good faith. In fact both the initial filing and the subsequent conduct of the proceedings were in bad faith and soaked in fraud. (3)

The misrepresentation was known to the Debtors to be false: at the time the involuntary petition was filed, the corporations had been wrongfully seized by the very parties seeking the involuntary bankruptcy, with the cooperation of the very parties that engineered the apparent insolvency of the companies by concealment of customer payment checks, who later operated the corporations as its officers while they were under this Court's jurisdiction. It cannot be said, taking the allegations of the Complaint as true, that the petitioning creditors that seized the voting rights to the stock of the corporations they sought to place into bankruptcy by means of an involuntary petition did not know that they sought to wrongfully seize control of Level Propane Gases, Inc. by fraudulent and unlawful means, among which was customer payment check concealment. Further, it cannot be said that, through their agents, the Debtors conducted the affairs of the Debtors in bad faith while the Debtors' going concern was under the jurisdiction of this Court, particularly with respect to disabling of the databases to misrepresent the size of the customer base and the number of customer tanks. (4.) The misrepresentation, that the plan was proposed in good faith and that the proceedings leading up to the proposal of the plan were in good faith, was made to induce the court to rely on it. (5) The Court acted in apparent reliance on the knowing misrepresentation of good faith and (6) as a consequence of the reliance entered the confirmation order.

Because the analysis of *Tenn-Fla Partners* necessarily makes specific reference to §1129, reference is appropriately made to the cases deciding whether plans proposed pursuant to that provision were made in good faith and not by any means forbidden by law. The "good faith requirement evolved into a threshold requirement in all bankruptcy cases," *In Re Zick* 931 F.2d 1124, 1127 (6th Cir., 1991), cited by *In Re Laguna Associates* 147 B.R. 709, 715 (U.S.B.C., E.D., Mi., 1992). Good faith is a threshold requirement for the confirmation of a reorganization plan.

“Good faith as it is used in § 1129(b) relates to whether or not there is "a reasonable likelihood that the plan will achieve a result that is consistent with the objectives and purposes of the Bankruptcy Code." *Matter of Madison Hotel Associates*, 749 F.2d 410, 425 (7th Cir.1984) *citing In the Nite Lite Inns*, 17 B.R. 367, 370 (Bankr. S.D.Cal. 1982). Congress did not intend the objectives and purposes of the Bankruptcy Code to include rewarding an individual for breaching his fiduciary duty and allowing an individual to utilize the Bankruptcy Code to drive a competitor out of business,” *In Re Unichem* 72 B.R. 95, 100 (N.D, Ill, 1987).

In *Unichem*, a reorganization plan proposed by one Gurtler, who while still an officer of the Debtor, set up a firm to go into direct competition with Unichem, financed it with his own personal borrowing, and hired away eight of its employees after authorizing a bulk sale to the new competitor at cost. He resigned without giving any reason, *In Re Unichem, supra*, 72 B.R. at 97-99. The Court rejected his plan because his “inequitable conduct was the cause of Unichem’s financial distress and he now attempts in his proposed plan to strike a final blow at Unichem’s existence,” *id*, at 100. Plaintiff has alleged inequitable conduct in his complaint of as egregious as Gurtler’s. Absorbing the remains of a business one has destroyed is not contemplated as a “result consistent with the objective and purposes of the Bankruptcy Code,” *In Re Weston* 209 B.R. 793, 797 (D. Mass., 1997.)

The Courts have explicitly recognized that no bright line test exists for good faith or bad faith, as the court in *In Re Phoenix Piccadilly, Ltd.* 849 F.2d 1393 (11th Cir., 1988) said:

“there is no particular test for determining whether a debtor has filed a petition in bad faith. Instead, the courts may consider any factors which evidence “an intent to abuse the judicial process and the purposes of the reorganization provisions” or, in particular, factors which evidence that the petition was filed “to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.” *In re Albany Partners, Ltd.*, 749 F.2d at 674, at 1394.

Here, while this Plaintiff seeks the revocation of the Confirmation of Plan, whether the initial Petition was filed in good faith remains essential to the analysis:

“It seems unquestionable to us that the taint of a petition filed in bad faith must naturally extend to any subsequent reorganization proposal; thus, any proposal submitted by a debtor who filed his petition in bad faith would fail to meet section 1129’s good faith requirement,” *In Re Natural Land Corp.* 825 F.2d 296, 298 (11th Cir, 1987), see, accord, *In Re Apple Tree Partners* 131 B.R. 380, 393 (W.D., Tn., 1991.)

This recognition is in keeping with the consistent holdings that existence of good faith with respect to a particular issue arising under the Bankruptcy Code will be assessed considering the totality of the circumstances, see *In Re Ross* 135 B.R. 230, 237, (E.D. Pa., 1991) citing, with respect to Confirmation of Plans under §1129(b), *In Re Texas Extrusion Corp.* 844 F.2d 1142, 1160 (5th Cir., 1988), accord *In Re Reinicke* 338 B.R. 292, 297, (U.S. B.C. N.D. Tx., 2006) citing *In Re Jasik* 727 F.2d 1379, 1383 (5th Cir., 1984), see also *Matter of Madison Hotel Associates* 749 F.2d 410 (7th Cir., 1984), cited by *In Re Love-Seeman Properties* 49 B.R. 770, 772-773 (U.S.B.C., D. Hi., 1985.) Even where a Plan has procured the required number of acceptances it will nonetheless be denied by the Bankruptcy Court if there is “intent to abuse or misuse the reorganization process,” where the purpose of the bankruptcy was to evade the State’s authority to enforce its laws that charitable organizations shall not be appropriated to profit-making use, *Matter of Jesus Loves You, Inc.* 46 B.R. 37, 40-41 (U.S.B.C., M.D. Fla., 1984).

All of these foregoing cases, speaking to the totality of the circumstances, circumstances that reach back in many instances before the filing of the petition in particular cases, e.g. *In Re Unichem, supra, In Re Laguna Associates, supra*, rebuke the Defendant’s assertion that:

“Nothing in the language or jurisprudence under section 1144, including *Tenn-Fla Partners*, supports the 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.” Defendant’s Supplemental Memorandum at 4, see also at 7.

The entire jurisprudence of 11 U.S.C. §1129 and to challenges to the plans confirmed under 11 U.S.C. §1144, call on the parties and the Court assess the good faith of a plan, a statutory essential to a plan’s confirmation, in the “totality of the circumstances,” see also *In Re Natural*

Land Corp., supra, since the “integrity of the bankruptcy process rests upon a debtor’s full and honest disclosure of all required information,” *In Re Goyner* 383 B.R. 321, 322 (N.D. Ohio, 2007.)

When all of the foregoing cases are read with *Tenn-Fla Partners, supra*, its clearly holds that where a Debtor misrepresents its good faith with respect to its plan it has not only failed to cross the threshold required for confirmation, but, making the materially false representation, knowing it to be false, to induce the court to rely on that representation, and the court so relying on that knowing, false and material misrepresentation confirmed the plan, the plan is subject to revocation pursuant to 11 U.S.C. §1144.

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11 U.S.C §1144 REQUIRES CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES IN EXAMINING GOOD FAITH AND FRAUD WITH RESPECT TO CONFIRMATION OF A PLAN SO REQUIRES REFERENCE TO ALL PROCEEDINGS LEADING UP TO THE PLAN PROPOSED AND CONFIRMED.

The Plaintiff has alleged facts and circumstances that in their totality render the Debtors’ representation that they proposed their liquidation plan in good faith fraudulent. If this Plaintiff is able to prove by the preponderance of the evidence the facts alleged, then he is entitled to a judgment revoking the Confirmation of the Plan pursuant to 11 U.S.C. §1144, *Tenn-Fla Partners, supra*, 229 B.R. at 727. The Defendant protests that:

“Nothing in section 1144 or case law interpreting it suggests that an action for revoking confirmation can or should be a vehicle for contesting the conduct of all the proceedings in a debtor’s chapter 11 case. Because that is exactly what Maloof seeks to do, rather than allege and address the recognized and essential elements of a claim under section 1144, the Complaint should be dismissed,” Supplemental Memorandum at 7.

Plaintiff has demonstrated above that when a bankruptcy court addresses good faith it does so in light of the totality of the circumstances. Good faith is essential to the confirmation of a Chapter

11 plan, 11 U.S.C. §1129(a)(3). When a complaint alleges that the confirmation of a plan has been procured by fraud, 11 U.S.C. §1144, it will do so necessarily in light of the good faith of that plan. The predecessor to the Defendant affirmatively represented that this plan was proposed in good faith in advancing its confirmation by the Court. As such, as argued above, whether the plan proponent affirmatively misrepresented its good faith is the issue properly brought before this Court by this Complaint. This asserted good faith can and must be addressed in the totality of the circumstances, which necessarily requires an examination of the proceedings leading up to the proposed plan and its confirmation.

Even the cases cited by the Defendant recognize this, see e.g. *In Re Future Energy* 83 B.R. 470, 486 (U.S.B.C., S.D. Ohio, 1988) and *In Re Texas Extrusion Corp.* 844 F2d 1142, 1160 (5th Cir., 1988.) Here, the totality of the circumstances, as in *In Re Unichem, supra*, disclose that the plan was proposed in bad faith, and that, as such, given the totality of the circumstances, even with the requisite votes in its favor, it could not be confirmed, *In Re Jesus Loves You, Inc., supra*. In neither *Unichem* nor *Jesus Loves You* did the court select which circumstances it would examine, rather, in conformance with established precedent, they both examined the totality of the circumstances, which in both cases included both circumstances pre-petition and post-petition. In both cases plan confirmations were rejected. Thus, contrary to the argument of the Defendant, this Plaintiff, addressing the totality of the circumstances, did indeed as the Defendant demands “allege and address the recognized and essential elements of a claim under section 1144.” Having done so, the Plaintiff must be permitted to be put to his proof.

CONCLUSION

For the reasons set forth above, Plaintiff urges this Court to rule consistently with the law under 11 U.S.C. §§1144 and 1129(a)(3) and deny this Motion to Dismiss so that the Plaintiff’s

claims can be put to their proof under the totality of the circumstances. Any other result will be a short-circuiting of the necessary judicial process that no expedient can justify.

Respectfully submitted,

/s/ David C. Eisler

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SERVICE

The foregoing has been filed electronically this 15th day of June, 2009. It is available to all parties who access the Court website. Parties may access this filing through the Court's system.

/s/David C. Eisler

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