

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHER DISTRICT OF OHIO  
EASTERN DIVISION

In re:	)	Chapter 11
	)	
LEVEL PROPANE GASES, INC., <i>et al.</i> ,	)	Case No. 02-16172
	)	Jointly Administered
Debtors.	)	
_____	)	JUDGE: Randolph Baxter
	)	
WHM EMPRISES, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	
	)	
WILLIAM H. MALOOF,	)	
	)	
Defendant.	)	

**PLAINTIFFS’ BRIEF IN OPPOSITION TO MOTION OF WILLIAM H. MALOOF  
TO DISQUALIFY DEBTORS’ COUNSEL PURSUANT TO 11 U.S.C. SEC. 327**

Plaintiffs, WHM Emprises, Inc., The Park Place Companies, Inc., Park Place, Inc., Park Place Management, Inc., Over-Flo Lot, Inc., Amware Distribution Warehouses, Inc. and Level Propane Gases, Inc. (“Debtors”), hereby oppose Defendant William H. Maloof’s (“Malooof”) motion to disqualify current counsel for the Debtors, Benesch Friedlander Coplan & Aronoff LLP (“BFCFA”), on the grounds that BFCFA also represents Deutsche Bank, LaSalle Bank NA, Provident Bank and their agent BT Commercial Corp., collectively defined as the “Bank Group.” The grounds for Debtors’ opposition is simple, BFCFA has never acted as counsel for the Bank Group and Judge Aldrich’s Memorandum makes no such finding.

**I. RELEVANT FACTS**

**A. BFCFA Has Never Acted As Counsel For The Bank Group**

On July, 31, 2002, the Bankruptcy Court appointed BFCFA as counsel for the Debtors and Debtors in Possession as follows:

07/31/2002	<p>Hearing Held (related document(s)<a href="#">100</a>EMERGENCY APPLICATION for an Order pursuant to sections 327(a) and 328(a) of the Bankruptcy code authorizing employment and retention of William Blair &amp; Co LLC as Investment Bankers Filed by pro se Level Propane Gases, Inc.--- GRANTED IN PART, DENIED IN PART, <a href="#">116</a>Objection to to Emergency Application for an Order pursuant to sections 327(a) and 328(a) of the Bankruptcy code authorizing employment and retention of Williams Blair &amp; Co, LLC as Investment Banker for Debtors and Debtor in possession Filed by US Trustee --- SUSTAINED IN PART OVERRULED IN PART, <a href="#">148</a>Response to the Objection of the US Trustee to Emergency Application for an Order pursuant to sections 327(A) and 328(A) of the Bankruptcy code authorizing employment and retention of William Blair &amp; Co, LLC as investment Banker for Debtors and Debtors in possession Filed by Level Propane Gases, Inc. , [155]SUPPLEMENTAL Verified Statement of Proposed Investment Banker, Samuel J Tinaglia firm of William Blair &amp; Co pursuant to Bankruptcy rule), [83]<b>Application for Order pursuant to section 327(a) of the Bankruptcy code authorizing Employmen and Retention of William E Schonberg of Benesch, Friedlander, Coplan &amp; Aronoff LLP as Attorneys for Debtors and Debtors in possession Filed by pro se Level Propane Gases, Inc..(with Attached Affidavit) --- GRANTED</b>, [152]Objection to Application for an Order pursuant to section 327(a) of the Bankruptcy code authorizing employment and retention of Benesch, Friedlander, Coplan &amp; Aronoff LLP as Attorneys for Debtors and Debtors in possession Filed by US Trustee --- OVERRULED, [154]Response to the Objection of the US Trustee to Application for an Order pursuant to section 327(a) of the Bankruptcy code authorizing employment and retention of Benesch, Friedlander, Coplan &amp; Aronoff LLP as Attorneys for Debtors and Debtors in possession Filed by Level Propane Gases, Inc.. (sredd, crt) (Entered: 08/01/2002)<sup>1</sup></p>
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Moreover, as is evident by the docket in every filing in Case No. 02-16172 and related proceedings, each of the entities in the Bank Group have not been represented by BFCA. The dockets clearly reflect that at no time has BFCA appeared on behalf of any of the entities Maloof has deemed the Bank Group.

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<sup>1</sup> Order dated July 31, 2002, emphasis added, Bankruptcy Docket in Case No. 02-16172, *Level Propane Gases, Inc., et al.*

**B. Judge Aldrich Did Not Render A Factual Finding That BFCA Was Counsel For the Bank Group**

The only evidence Maloof puts forward in support of his allegation that BFCA is counsel for the Bank Group is the assertion that the Memorandum and Order rendered by Judge Aldrich on August 16, 2007 (the “Memorandum”) made a “finding of fact” that BFCA was counsel for the Bank Group. It did not.

At issue before Judge Aldrich in the Memorandum was the appeal by Maloof from this Court’s denial of Maloof’s Motion to Vacate and Motion to Withdraw the Reference and a Motion to Strike documents not properly before the appellate court. In a recitation of the facts, Judge Aldrich states that “[o]n June 6, 2002, the Debtors defaulted and the Bank Group accelerated all outstanding obligations ... Sweet immediately retained Benesh [sic], Friedland [sic] Coplan and Aranoff [sic] LLP (“BFCA”) as counsel for each of the Debtors.”<sup>2</sup> “On April 30, 2003, on a motion of the Trustee, the Bankruptcy Court ordered the appointment of Ray Warner to serve as examiner (“Examiner”), to investigate whether BFCA misled the Court, the Debtors, and/or Maloof by failing to provide objective advice and/or by committing fraud.”<sup>3</sup> “[T]he Examiner filed a report finding that there was no evidence that BFCA had committed any wrongdoing.”<sup>4</sup>

In discussing the grounds for her denial of Maloof’s Motion to Withdraw the Reference and Vacate, Judge Aldrich stated as follows:

In an effort to obtain evidence that would be sufficient to support an allegation of fraudulent misrepresentation to the Court, an examiner was appointed to determine if BFCA, the “officers of the court” representing the Bank Group, had corrupted the adjudication process. The Examiner found that BFCA had acted in good faith, competently and honestly. Like the Bankruptcy Court

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<sup>2</sup> Judge Aldrich’s Memorandum at p. 2, attached as Exhibit A for the convenience of the Court.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at p. 3.

below, the court accepts the Examiner's findings of fact, since he reviewed many documents and conducted extensive interviews. There is no evidence of the type of deliberately planned and carefully executed scheme to defraud the court that was present in the *Hazel-Atlas* line of cases.<sup>5</sup>

In all likelihood, the snippet taken out of context from the eleven page memorandum relied upon by Maloof represents a typographical error. However, the most that could be read into Judge Aldrich's recap of the Examiner's appointment was that the Examiner was appointed to determine if BFCA had acted in a way that constituted representation of the Bank Group.

Most importantly, had Judge Aldrich actually deemed BFCA to have acted in "representation" of the Bank Group, she would not have denied Maloof's motion on the basis that "[t]here is no evidence of the type of deliberately planned and carefully executed scheme to defraud the court that was present in the *Hazel-Atlas* line of cases."<sup>6</sup> The language following the statement quoted by Maloof makes it clear that no such evidence was in the record before the court and that BFCA acted not on behalf of the Bank Group but honestly and competently in the exercise of its duties to the Debtors.

## **II. LAW AND ANALYSIS**

Maloof attempts to claim that BFCA is not a disinterested party pursuant to 11 U.S.C. § 1101(14)(e) by asserting that BFCA has been found by a court to be "officers of the court, representing the Bank Group." This lone justification for claiming BFCA is not disinterested is nothing more than a twisted manipulation of dictum in Judge Aldrich's order.

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<sup>5</sup> *Id.* at p. 8.

<sup>6</sup> *Id.*

Dictum is “a statement made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . .”<sup>7</sup> A restatement of events, especially a restatement of prior events that can be shown to be: a) an inaccurate statement of the facts, or b) a typographical error must be deemed unnecessary to the decision and therefore not precedential. Moreover, when the statement itself is at best ambiguous in its intended meaning based on word use and context, it cannot be deemed a finding of “fact” by the Court. In short, contrary to finding that BFCA was retained by the Bank Group, the appointment by court order makes it an indisputable fact that BFCA was appointed as counsel for the Debtors and Debtors in Possession.

Maloof urges this Court to apply dictum, which is at best ambiguous, as a binding determination that BFCA represented the Bank Group. This conclusion is completely unwarranted in light of the undisputed fact that the Bank Group was represented by counsel other than BFCA at all times, BFCA never appeared on behalf of the Bank Group and order in which the dictum appears actually affirms the conclusion that BFCA acted in good faith, competently and honestly as counsel for the Debtors.

## **II. CONCLUSION**

For the foregoing reasons, Debtors respectfully request that Maloof’s Motion to Disqualify Debtor’s Counsel pursuant to 11 U.S.C. § 327 be denied.

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<sup>7</sup> *Best Life Assurance Co. v. Comm’r*, 281 F.3d 828, 834 (9th Cir. 2002) (quoting Black’s Law Dictionary 1100 (7th ed.1999)).

Dated: Cleveland, Ohio  
January 28, 2008

Respectfully submitted,

/s/Mariann E. Butch

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 28, 2008, a copy of the foregoing Plaintiffs' Pretrial Statement 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/Mariann E. Butch

Mariann E. Butch  
One of the Attorneys for Plaintiffs