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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELANDIN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Re:)	
Level Propane, Gases, Inc., et. al.)	Case No. 02-16172
)	
)	Ch. 11
)	
)	Hon. Randolph Baxter

WILLIAM H. MALOOF'S OPPOSITION TO THE MOTION FOR ENTRY OF AN ORDER APPROVING THE COMPROMISE OF CLAIMS AND TERMS OF SETTLEMENT AGREEMENT AND RELATED RELEASES OF WALTER HIMMELMAN, WILLIAM H. MALOOF, AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA. (Docket Item No. 3231)

Now comes William H. Maloof, by and through counsel undersigned, and for his Opposition to the Motion for Entry of an Order Approving the Compromise of Claims and Terms of Settlement Agreement and Related Releases of Walter Himmelman, William H. Maloof, and National Union Fire Insurance Company of Pittsburg, Pa., states as follows:

Introductory Statement

This suit was instituted by the asserted Debtors and the Creditors' Committee to collect proceeds of a policy issued by National Union Fire Insurance Company, a subsidiary of Hank Greenburg's AIG. The policy was a Directors' and Officers' (D & O) policy issued pre-petition and bearing the No. 873-83-98. The policy was a "claims made" policy, which covers claims not as they arise but only when they are made. Such policies can be extended by a so-called "tail" by which coverage of past liabilities is extended to later claims made, see *Buckeye Ranch, Inc. v. Northfield Insurance Co.* 134 Ohio Misc. 2d 10, 17 (Franklin CCP, 2005), see also *In Re: Lavigne* 114 F.3d 379 (2d Cir., 1997), "Construction and Application of 'Tail' Insurance Policies" 21 ALR 6th 515 (2007). In this case, a *one-year* tail policy was purchased when the

original pre-petition post-petition expired post-petition. No claims were made in that year. After the parties in control of these proceedings disposed of the going concerns, they turned their attention to the litigation assets of that remained. In order to realize cash on this asset, a second tail on the pre-petition D & O policy had to be purchased. Such a “tail” is unheard-of among underwriters in these circumstances: since its only purpose would be to make a claim on the pre-petition officers or directors. From an underwriter’s viewpoint, authorizing such a “tail” would be a sure loss that could not meet even minimum underwriting standards, and would surely cost the underwriter his job. It would be on par with insuring a vacant building that is already ablaze.

From the beginning of the Adversary Proceeding, Mr. Maloof made it clear that he had no interest in settling this suit, which he believed altogether unjustified, and made it clear that any mediation was altogether unacceptable to him.¹ Neither he nor any of his counsel have participated in, let alone been informed of, the negotiations that have led to this proposed “settlement.” This is made patent by the fact that there is no line for Mr. Maloof’s signature on the “Settlement Agreement.”

The first attempt to gain court approval for this “settlement” was rejected when the Plaintiffs attempted to assure Mr. Himmelman injunctive protection beyond the power of this Court to grant. This second attempt should be likewise rejected for the reasons that are set forth below.

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**Court Approval of the “Settlement” Would be in Derogation of
Mr. Maloof’s Due Process Rights**

It is painfully apparent that this “Settlement” altogether excludes Mr. Maloof as a party, except to the extent that it seeks to impose onerous terms upon him as a putative party.

1.) Those present at the mediation have stated that it lasted all of 90 seconds when AIG offered the balance of the policy and Mr. Sues, on Level Propane’s behalf replied “Done.”

“It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable.” *In Re LeMarre* 494 F.2d 753,756 (6th Cir., 1974.)

If Mr. LeMarre could not be subjected to contempt because he respectfully but steadfastly refused to participate in a settlement, no settlement can be imposed upon Mr. Maloof despite his stated opposition to it. Similarly:

“[W]here material facts concerning the existence of an agreement to settle are in dispute, the entry of an order enforcing an alleged settlement agreement without a plenary hearing is improper,” *Kukla v. National Distillers Products Co.* 483 F2d. 619, 622 (6th Cir., 1973).

Here, there can be no doubt that Mr. Maloof, though a Defendant in the Adversary Proceeding, is in no respect party to the purported “Settlement.” His name does not appear on the proposed agreement, neither of his counsel have joined the motion for the “settlement” and he has already once defeated an attempt to impose the very similar terms upon him brought before this Court. For this court to impose the terms of this “settlement” on Mr. Maloof is no different from forcing a party to participate in a summary trial in an attempt to coerce him to settle a claim:

“Although judges should encourage and aid early settlement, however, they should not attempt to coerce that settlement. “Rule 16 ... was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation.” *Strandell*, 838 F.2d at 887. Requiring participation in a summary jury trial, where such compulsion is not permitted by the Federal Rules, is an *158 unwarranted extension of the judicial power,” *In re NLO, Inc.* 5 F3d. 154, 157 (6th Cir., 1993.)

There is little difference between forcing participation in a procedure designed to reach settlement and imposing the terms of a settlement that is anathema to a party on him. Were this Court to impose the terms of this “settlement” on Mr. Maloof, especially when there exists a clear dispute as to whether there is a settlement at all, it would do so by an unwarranted extension of the judicial power that would be in derogation of Mr. Maloof’s due process rights.

The Asserted Settlement is Funded by a Bad-Faith Policy “Tail.”

As set forth above, the funding for this “settlement” exists only because a second tail was purchased just as those in control of these proceedings turned their attention to the litigation assets that remained. No other reason existed to purchase a second tail on the D & O policy than to sue for its proceeds. The shares of these companies were owned by one person, William Maloof. There were no aggrieved third-party shareholders: Mr. Maloof would have to sue himself as director were he to bring suit. In the event that trial is had in this matter, Mr. Maloof is prepared to prove not only that the policy tail was purchased for no other reason than to liquidate the policy to fund counsel fees, but that the purchase of this tail was so extraordinary that it could not have been issued in good faith.² The irregularity of this transaction is a hair’s-breadth away from the criminal. This Court is empowered to reject iniquity to the same extent that it is empowered to do equitable justice, 11 U.S.C. Sec. 105. This is one of those occasions when it must do so.

In conclusion, this “Settlement” is funded by a tail purchased only so that a policy could be liquidated, of such high and obvious risk that no underwriter with a hope of keeping his job would authorize it and it is attempted despite the vehement objections of one the Defendants, William H. Maloof, on whom onerous terms are imposed. Were this court to approve this “settlement” it would do so despite Mr. Maloof’s unmistakable and often repeated statement that he finds the terms of this “settlement” completely unacceptable. To approve of this settlement would be both to acquiesce to a bad-faith policy “tail” as its funding and to the derogation

2. One of the champions of this litigation and “settlement,” Morris, Nichols, Arsht & Tunnell, failed to disclose the bad faith attending to the purchase and liquidation of the policy “tail” in their own pleading, as the omissions in Paragraph 10 of their Motion demonstrates. Morris, Nichols is no stranger to failure to disclose, and have suffered the consequences of that failure already when they were forced to disgorge fees as Debtor’s Counsel of eToys, see *In re: eToys* 331 B.R. 176 (U.S.B.C., D. Del., 2005.)

of Mr. Maloof's due process rights when he has strenuously and repeatedly stated his opposition to a settlement of any kind.

Wherefore, for the reasons set forth above, William H. Maloof prays that this Court reject the oppressive and unlawful compromise proposed by the Motion.

Respectfully Submitted,

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SERVICE

I hereby certify that on this 1st day of February, 2008, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ David C. Eisler
David C. Eisler, Counsel for William H. Maloof