

IN 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

**REPLY BRIEF IN SUPPORT OF WILLIAM H. MALOOF’S EMERGENCY MOTION
TO DISQUALIFY BENESCH, FRIEDLANDER, COPLAN & ARONOFF’S (BFCA)
OPPOSITION TO MOTION TO DISQUALIFY BFCA AS COUNSEL FOR THE
ASSERTED DEBTORS-IN-POSSESSION (Docket Item No. 3225)**

Now comes William H. Maloof, by and through counsel undersigned, and submits the following Reply Brief in Support his Motion to Disqualify Benesch, Friedlander, Coplan & Aronoff (BFCA) as Counsel for the asserted Debtors-in-Possession, Docket Item No. 3225:

INTRODUCTORY STATEMENT

That BFCA were officers of the court representing the Bank Group is an observation of fact by the District Court accepting the findings of the Examiner appointed in this case. All of the cases that Mr. Phillips cites in support of his “dictum” argument bear on whether a particular statement as to the law is a holding or dictum. They have no application to the matter at hand: whether the District Court accepted as fact that BFCA represented the Bank Group and whether, as a result of that statement of fact, BFCA can no longer to be regarded as “disinterested” as defined by 11 U.S.C. Sec. 101(14). The District Court’s clear characterization of BFCA as officers of the court representing the Bank Group is no “snippet” that Mr. Phillips describes, it is decisive statement of the District Court that was essential to its findings: the District Court has described BFCA as Officers of the Court representing the Bank Group, having read the Examiner’s Report and accepted the Examiner’s findings. The District Court does not describe

them as duly appointed counsel for the Debtor, but officers of the court representing the Bank Group. The Opposition is a desperate attempt to induce this Court to evade the necessary step to rule that the District Court's statement, that BFCA represented the Bank Group the day it was appointed as the asserted Debtors' Counsel, was dispositive of BFCA's "disinterestedness" under the Code. Under 11 U.S.C. Sec. 327, requiring "disinterestedness" as defined by 11 U.S.C. Sec 101(14), BFCA could not be appointed.

-1-

**THE DISTRICT COURT MADE A FINDING OF FACT
WITH RESPECT TO BFCA IN ITS OPINION OF AUGUST 16, 2007**

Critical to the assessment of the District Court's statement accepting the findings of the Examiner, is the scope of the Examiner's report as defined by this Court in 2003. This Court expressly excluded from the scope of the Examiner's investigation the retention of Debtor's Counsel, BFCA, when gave its Instructions to the Examiner appointed in this case (Docket No. 1356) on April 30, 2003. In excluding this matter from the scope of the Examiner's investigation, this Court observed at p. 2 of its Order:

"The appointability of a professional in bankruptcy cases, including the requirement of disinterestedness and inherent good faith, is always before the Court and can be considered by the Court at any time," emphasis supplied.

Thus the District Court was not limited by the findings of the Examiner as to whether BFCA was Debtor' counsel – the Examiner could find that BFCA acted "competently and honestly" yet represent the Bank Group. Whether BFCA represented the asserted Debtors and whether BFCA's appointment comported with the Code's requirement of disinterestedness for appointed professionals had no bearing on the District Court's finding.

- 2 -

-a-

Like the Bankruptcy Court, the District Court Accepted the Examiner's Finding that BFCA Represented the Bank Group.

The statement that BFCA were officers of the court representing the Bank Group when read in context of the entire Opinion is indeed a finding of the District Court. The District Court said further on in that same paragraph that: "Like the Bankruptcy Court below, the court accepts the Examiner's finding of fact," (Opinion at 8). The District Court, by embracing the findings of the Examiner, found that BFCA, at the time in issue, June 11, 2002, represented the Bank Group. The Examiner's Report made it clear that Charles Sweet, the individual hired by the Bank Group to act as Level Propane's Director, took the direction of the Bank Group's counsel, Jeff Marwil, to hire BFCA to work with Level Propane, see Examiner's Report at 79. That BFCA were "officers of the court' representing the Bank Group" is further born out by this Court's own docket which discloses that Level Propane was *pro se*, that is to say *without counsel*, until September 23, 2002, see e.g. Docket Item Entries Nos. 13, 18, 27, 30 and 36.

-b-

As a Result of the District Court's Acceptance of the Examiner's Report, BFCA was Disqualified the Moment it was Appointed.

Thus, that the District Court found that BFCA represented the Bank Group on the day at issue, June 11, 2002, the day of the Agreed Order that your Movant sought to vacate in 2006, is indeed a finding as contemplated by case law and in no respect dictum. Moreover, this Court's Docket discloses that Level Propane was *pro se* until September 23, 2002. Taking these two facts together it is clear that *the District Court made a finding of fact about which it was not mistaken*. As such, it cannot possibly be subject to review by this adjunct Article I Court.

The Opposition of BFCA to the Motion to Disqualify them as counsel, which calls upon this court to dismiss the finding of the District Court that BFCA were officers of the court

representing the Bank Group calls upon this court to defy a reviewing court's finding, not interpret it, but ignore it, thereby defying the hierarchy of appellate review basic to this system of justice, see 28 U.S.C. Sec. 157 and 28 U.S.C. Sec. 1291.

-2-

**THE FINDING OF FACT WITH RESPECT TO BFCA WAS NECESSARY
TO THE DISTRICT COURT'S ANALYSIS.**

In its defense of its pleading, BFCA resorts to a characterization of the District Court's language in question as mere "dictum," neither related to a holding nor essential to its reasoning in reaching any holding. This argument is so flimsy as to insult the intelligence of this Court.

-a-

**The Language at Issue was a Finding of the District Court,
Knowingly Mischaracterized as Dictum by BFCA.**

There is no doubt that the lawyers at BFCA are capable of reading the Opinion of the District Court and capable of reading that the District Court made a finding when it stated that they represented the Bank Group and capable of reading the District Court did so by accepting the finding of the Examiner. To claim otherwise would simply be to insult fellow members of the bar. Faced with the necessary reading of the District Court's Opinion, BFCA nonetheless argued in its Opposition to Movant's Motion to Disqualify them as Debtors' Counsel that the *District Court got the facts wrong, or made a typographical error*, or the statement was dictum in any event.

Faced with the necessary reading of the District Court's Opinion, BFCA resorted to a desperate absurdity when it argued that the statement that they represented the Bank Group was not a finding, despite the District Court's clear statement that it accepted the finding of the Examiner. When BFCA argued that it was dictum and no finding, it could only have done so in

bad faith. The arguments that the District Court was factually mistaken, made a typographical error, and that its statement was mere dictum in any event, insult the District Court and this Bankruptcy Court. The Opposition of BFCA attacks the institutional structure essential to the orderly administration of justice, insults the District Court as an institution, and insults this Bankruptcy Court when it has the nerve to call upon to participate in that affront.¹

-b-

The Analysis Characterized as “Dictum” by BFCA was Essential to the District Court’s Analysis.

There can be no backing away from its affront by arguing that the statement was mere dictum: at issue was whether the June 11, 2002 Agreed Order could be vacated solely as a result of whether Level Propane’s going-concern assets were later sold (District Court Opinion at 7). *In order to reach this conclusion, the Court had to exclude any other basis for vacating that Agreed Order.* Its discussion of the Examiner’s Report and the role of BFCA was therefore critical to its analysis, and, absent that discussion, the District Court knew that it would have reached a naked conclusion without making the analysis required of a reasoned holding.

Thus, under the very the cases that BFCA itself cites on p. 3 of its Objection to the Motion to Strike, in order to dismiss the analysis of the District Court, since, in contrast to

1.) Three glaring irregularities shielded BFCA during the proceedings that are central to the District Court’s discussion:

**First*, the Order appointing them as Debtors’ Counsel was never served on Movant, despite the fact that their appointment was a breach of a specific representation made to the Movant that they would only serve as transitional counsel (the complete Order was surrendered to Movant’s counsel by the Court Deputy only after counsel repeatedly requested it and submitted the National Archive and Records Administration communication to the effect that it was missing from the Archives, see Exhibit “A”);

**Second*, the Order which showed that neither Movant nor any of his counsel were served with the Order was missing from the National Archives and Records Administration, see Docket Item No. 3077(attached as Exhibit “B,”) along with approximately 100 other pre-PACER documents; and

**Third*, evidence in the Examiner’s Report was redacted, *and remains redacted to this day*, in flat defiance of this Court’s Order that there be no redaction whatsoever in the Examiner’s Report, Docket Item No. 1807. Counsel notes that the text of this Order, Docket Item No. 1807, in which it denied BFCA’s Motion to Redact portions of the Examiner’s Report, is missing from the Docket, (attached Exhibit “C”) just as was Docket Item No. 563, the Order Appointing BFCA as Debtors’ Counsel.

Wilder v. Apfel, 153 F.3d 799 (7th Cir., 1998) the discussion in issue was integral its analysis, grounded in the concrete legal dispute outlined above, and anchored in the particular facts before the District Court, see 153 F.3d at 803. Similarly, the discussion of what the Examiner found, and the District Court accepted, could not be excised from its Opinion without seriously impairing the analytical foundations of the Opinion, see *Sarnoff v. American Home Products, Inc.* 798 F.2d 1075, 1084 (7th Cir., 1986), see also *Hormel Foods Corp. v. Jim Henson Productions* 73 F.3d 497, 508 (2nd Cir., 1996), and *Export Group v. Reef Industries, Inc.* 54 F3d 1466, 1471 (9th Cir., 1995), quoting Black's Law Dictionary. Because these cases were cited by BFCA to bolster a position that it knew was contrary to the facts, that the District Court had made a finding and that finding, no matter how difficult to accept, was specific and necessary to its analysis.

CONCLUSION

In conclusion, for the reasons set forth above, that BFCA knew what the District Court said, knew that the District Court said it as a finding and nonetheless argued first, that the finding was an error of fact or a typographical error, and second, that, even so, it was dictum, when the analysis, BFCA's Opposition seeks to enlist this Bankruptcy Court in the subversion of the Court system by declaring that a superior court had erred. For these reasons, their Objection must be overruled and the Motion to Disqualify granted.

Respectfully Submitted,

/s/David C. Eisler

David C. Eisler, Counsel for the Movant

Ohio Reg. No. 0020362

P.O. B. 1721

Medina, OH 44258
(216) 214-2106
inqs@AOL.com

SERVICE

I hereby certify that on this 11th 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 the Movant