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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

**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

**DEBTORS' RESPONSE TO WILLIAM H. MALOOF'S OPPOSITION
TO MOTION FOR ENTRY OF AN ORDER APPROVING THE
COMPROMISE OF CLAIMS AND TERMS OF SETTLEMENT
AND RELATED RELEASES**

Level Propane Gases, Inc., and its affiliated debtor entities, debtors and debtors in possession herein (collectively, the "Debtors"), hereby respond to the Opposition of William H. Maloof ("Maloof") to the motion (the "Motion") of the Debtors and the Official Committee of Unsecured Creditors (the "Committee") for an order approving the compromise of claims and terms of the settlement agreement and the related releases (the "Settlement") entered into by and between the Debtors, the Committee, Walter Himmelman ("Himmelman") and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). Contrary to Maloof's assertions, the litigation that would be resolved and dismissed *with prejudice* upon approval of the Settlement, *Level Propane Gases, Inc., et al. v. William H. Maloof, et al.*, Adv. Pro. No. 04-01300 (Bankr. N.D. Ohio) (the "Adversary Proceeding") , was brought in June 2004 by the Debtors and the Committee to assert claims against Maloof and Himmelman for their acts and omissions as the pre-petition officers and directors of certain of the Debtors. Those claims were brought in good faith, without malice, and in compliance with requirements of Fed.R.Civ.P. 11, and their proposed resolution was the result of arms-length negotiations conducted through the mediation efforts of a former federal district court judge. (See Affidavit of Donald E. Ziegler,

attached as Exhibit A hereto.) Maloof's objections to the approval of the Settlement the Debtors and the Committee have reached with Himmelman and National Union are, as shown below, without merit.

1. Maloof first asserts that the Settlement would be in "derogation" of his due process rights. Although he never identifies what "due process rights" he believes would be offended if the court granted the requested order, he appears to claim that approval of the Settlement would somehow make him an unwilling party to the Settlement. Nothing in the Settlement provides for, nothing in the Motion seeks, and nothing in the requested order would command such result. Maloof plainly is not a party to the Settlement and the parties do not ask the court to compel his participation in that agreement.

2. As outlined in the Motion, the Settlement does not have a negative or derogatory impact on any "rights" Maloof may possess. No "onerous" terms are imposed on him. To the contrary, the Settlement confers various benefits on him, providing that: (a) Maloof does not admit to and denies all liability to the Debtors and the Committee; (b) Maloof receives a full and complete release from every claim of every kind the Debtors or the Committee have, had or may have against him; and (c) the Adversary Proceeding in which he is a defendant will be dismissed *with prejudice*. Plainly, Maloof will not suffer prejudice of any sort if the Settlement is approved and the Adversary Proceeding is dismissed. Under such circumstances, it is within the sound discretion of the court to approve the dismissal of the litigation in which Maloof is a defendant. *Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994) (an abuse of discretion in dismissing action will be found "only where the defendant would suffer 'plain legal prejudice' as a result of a dismissal *without prejudice*" (emphasis supplied)).

3. Maloof's second line of objection rests on the assertion that National Union made an irregular and unwise underwriting decision in accepting the Debtors' purchase of a "second" tail on the director and officer ("D&O") liability policy responding to the claims in the Adversary Proceeding. In this regard, he alleges that the "tail" was purchased solely so that the Debtors' estates could "sue for its proceeds." Neither decision, however, is before the court on the Motion. Maloof's allegations in this regard are completely irrelevant to the issue before the court under Fed.R.Bankr.P. 9019 – whether the Settlement is reasonable and is in the best interests of the estate. *See Treinish v. Topco Assoc., Inc. (In re AWF Liquidation Corp.)*, 208 B.R. 399 (Bankr. N.D. Ohio 1997); *In re Parkview Hospital-Osteopathic Medical Center*, 211 B.R. 603 (Bankr. N.D. Ohio 1997).

4. Even assuming *arguendo* that Maloof's allegations are correct regarding the Debtors' motivations for purchasing the "tail," such action was completely consistent with, if not required by, the fiduciary obligations of the Debtors to preserve and realize the value of the property comprising the Debtors' estates for the benefit of their creditors. As this court has previously found, the D&O liability policy and its proceeds are estate property. (See Memorandum and Opinion, entered December 3, 2004 (Dkt. No. 2749), at 5.) There is absolutely nothing inequitable, fraudulent or wrongful with the fact that this estate asset is now to be liquidated by the Settlement. Moreover, in complaining about the continuing existence of the D&O policy, Maloof appears to have forgotten that he prosecuted and was granted relief from the automatic stay in order to seek reimbursement of his defense costs from National Union under that very policy in connection with the Adversary Proceeding. (See Mtn. for Relief from Automatic Stay, filed Nov. 5, 2004 (Dkt. No. 2725), and order granting motion, entered Dec. 3, 2004 (Dkt. No. 2750).) He cannot now be heard to argue that the Debtors' decision to purchase

the extension of coverage under the policy was somehow wrongful when he has accepted – indeed, insisted upon receiving – the benefits of that decision.

Maloof has failed, in short, to raise a meritorious objection to the Motion. Accordingly, for these reasons and the authorities cited, the Debtors respectfully request that the Motion be granted, that the Settlement be approved and that the Debtors be granted such other and further relief as the court finds to be just and equitable.

Dated: Cleveland, Ohio
February 22, 2008

Respectfully submitted,

/s/ Mark A. Phillips

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Debtors and Debtors in Possession

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2008, a copy of the foregoing Response 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/Mark A. Phillips _____

Mark A. Phillips

One of the Attorneys for the Debtors