

**IT IS SO ORDERED.**

  
RANDOLPH BAXTER  
UNITED STATES BANKRUPTCY JUDGE

**Dated: 03 March, 2008 05:00 PM**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

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In re : Chapter 11  
 :  
LEVEL PROPANE GASES, INC., *et al.*, : Case No. 02-16172  
 : (Jointly Administered)  
 :  
Debtors. :  
 : Judge: RANDOLPH BAXTER  
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**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 PITTSBURGH, PA.**

Came on for hearing on the 26th day of February 2008 the motion (the "Motion") of Level Propane Gases, Inc., and its affiliated debtor entities, debtors and debtors in possession in the above-captioned, jointly administered cases under chapter 11 of Title 11 (the "Bankruptcy Code") of the United States Code (collectively, "Debtors"), and the Official Committee of Unsecured Creditors for entry of an order, pursuant to Bankruptcy Code section 105(a) and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), approving the compromise of claims and terms of the settlement agreement and the related releases entered into by and between the Debtors, the Committee, Walter Himmelman and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). The Court, having reviewed the Motion, the Settlement Agreement and having considered statements of counsel for the Movants and the record in this case **FINDS AS FOLLOWS:**

A. This court has jurisdiction over the subject matter of the Motion pursuant to 28 U.S.C. §§157 and 1334.

B. The approval of Settlement Agreement is a core proceeding pursuant to 28 U.S.C. §§157(b).

C. Notice of the Motion and the opportunity for hearing thereon was adequate, appropriate and sufficient under the circumstances.

D. William H. Maloof (“Maloo”) filed an objection to the Motion. Such objection should be overruled based on the findings of fact and conclusions of law herein, and for the reasons stated on the record, including the following findings of fact and conclusions of law: (i) the Policy (defined below) is property of WHM’s (defined below) bankruptcy estate pursuant to Bankruptcy Code section 541(a); (ii) the approval of Settlement Agreement as requested in the Motion will not cause Maloo to incur any personal liability or suffer prejudice; and (iii) granting the Motion will not impair Maloo’s due process rights, as dismissal of the Adversary Proceeding (defined below) without the consent of all parties thereto is permissible under Fed. R. Civ. P. 41.

E. These jointly administered Chapter 11 cases were commenced on June 6, 2002 (the “Petition Date”) by the filing of involuntary petitions for relief under chapter 7 of the Bankruptcy Code against Level Propane Gases, Inc. (“LPG”), Level Energy Group, Inc. (“LEG”), Park Place Management, Inc. (“PPM”), Park Place, Inc. (“PPI”), Over-Flo Lot Incorporated (“Over-Flo”), The Park Place Companies, Inc. (“PPC”) and WHM Emprises, Inc. (“WHM” and collectively, the “Original Debtors”), which involuntary cases were subsequently converted into voluntary cases under chapter 11 of the Bankruptcy Code and orders for relief entered therein on June 17, 2002.

F. On September 11, 2002, Level Energy Distribution, Inc. (“LED”), Level Energy Transport, Inc. (“LET”), Lenergy Transport Leasing, Inc. (“LTL”), EP Transport, Inc. (“EPT”), WHM Carrier Services, Inc. (“WHMCS”), WHM Management Services, Inc. (“WHMMS”) and Amware Distribution Warehouses, Inc. (“Amware”) each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On October 9, 2002, this Court entered an order directing the joint administration of LED, LET, LTL, EPT, WHMCS, WHMMS, and Amware’s chapter 11 cases with the Original Debtors’ chapter 11 cases. On July 20, 2004, subsequent to the commencement of the Adversary Proceeding, the Court entered an order dismissing the Chapter 11 cases of WHMCS, LEG, LTL and LET (the “Former Debtors”).

G. On July 2, 2002, the Creditors’ Committee was appointed in the Debtors’ jointly administered cases by the Office of the United States Trustee for this region (the “UST”) pursuant to section 1102 of the Bankruptcy Code.

H. Among the assets of the Debtors’ estates are claims against Walter Himmelman and Maloof, former shareholders, directors, officers and/or employees of one or more of the Debtors, which claims and/or causes of action are the subject of that certain adversary proceeding denominated as *Level Propane Gases, Inc., et al, v. William H. Maloof, et al.*, and designated as Adversary Proceeding Number 04-01300-rb (the “Adversary Proceeding”).

I. The Adversary Proceeding was brought in good faith, without malice and in compliance with the requirements of Rule 11 of the Federal Rules of Civil Procedure made applicable herein by Bankruptcy Rule 9011.

J. Prior to the Petition Date, National Union issued Directors, Officers & Private Company Liability Policy No. 873-83-98 (the “Policy”) to WHM, which Policy provided, *inter*

*alia*, coverage for certain director and officer liability claims. The Policy had a maximum value of \$3,000,000.

K. After extensive discovery, the Movants, Himmelman and National Union agreed to mediate the claims asserted in the Adversary Proceeding and selected Donald E. Ziegler, former Chief Judge of the United States District Court for the Western District of Pennsylvania, to serve as mediator.

L. During the course of the mediation, the Parties entered into arms-length negotiations resulting in a term sheet setting forth the framework for a settlement of, *inter alia*, the claims asserted in the Adversary Proceeding, subject to the approval of this Court, the final terms of which settlement were to be memorialized by the Parties. After protracted negotiations, the Parties agreed to the final terms of a written settlement agreement (the “Settlement Agreement”), a copy of which was annexed to the Motion.

M. The principle terms of the Settlement Agreement are as follows:

- a. **No Admission of Liability.** This Agreement represents the compromise of disputed claims, and the terms, covenants and payments set forth in this Agreement are not to be construed as: (1) an admission of liability by Himmelman or Maloof and all liability is expressly denied by Himmelman and Maloof nor (2) an admission of liability by WHM or the Creditors’ Committee and all liability is expressly denied by WHM and the Creditors’ Committee.
- b. **Consideration and Release.** In consideration of the payment of \$1,500,000 (“Settlement Sum”) by National Union to “WHM Emprises, Inc.,” the sufficiency of which is hereby acknowledged, WHM and the Creditors’ Committee hereby fully and forever waive, release, acquit and discharge Himmelman, Maloof and National Union from any and all claims (including but not limited to claims defined by 11 U.S.C. §101(5)), demands, causes of action, liabilities, damages, costs, expenses, fees (including attorney fees) and/or interest (including interest on the settlement sum under R.C. § 1343.03 and *Hartmann v. Duffey*, 95 Ohio St.3d 456 (2002)), concerning, relating to or arising out of the Creditor Claims, the WHM Claims and/or for coverage under the Policy.
- c. **Full Release.** WHM and the Creditors’ Committee expressly warrant, represent and agree that it is their express intent that this Agreement operate such that

National Union, Maloof and Himmelman shall not be required to pay anything more than the consideration set forth in this Agreement concerning, regarding, resulting from or arising out of the WHM Claims, the Creditor Claims and/or for coverage under the Policy, and that the Agreement shall be construed most broadly to release every claim of every kind, whether known or unknown, which WHM and/or the Creditors' Committee have, had or may have against Himmelman, Maloof and/or the Policy, whether arising at law, in equity or otherwise. The release provided herein is not intended to be, and should not be construed as, a waiver or limitation of (1) the ability of WHM, the Creditors' Committee and/or Himmelman to seek to enjoin Maloof from taking any action against them, including rights and remedies to enforce any such injunction or for violation of any such injunction, or (2) to raise any defenses, including the affirmative defenses of accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, privilege, release, *res judicata*, statute of frauds, statute of limitations and/or waiver, in defense of any claims, demands or causes of action, known or unknown, arising at law, in equity or otherwise, that have been or may be asserted by Maloof against them.

WHM and the Creditors' Committee agree to deposit \$100,000 of the Settlement Sum in an interest bearing escrow account until the effective date of a Plan of Reorganization or Liquidation to (1) indemnify, defend and hold harmless National Union from any claims for coverage under the Policy made by Maloof as a result of any actions taken against Maloof by or on behalf of WHM and/or the Creditors' Committee and (2) indemnify, defend and hold harmless Himmelman from any claims made against Himmelman concerning, related to or in any way arising out of Himmelman's direct or indirect involvement with WHM, including but not limited to the transactions and occurrences described in the Adversary Proceeding or Bankruptcy Cases. WHM also agrees to request an injunction that covers pre-petition officers and directors when WHM pursues a plan of reorganization or liquidation.

Except with respect to claims for defense and indemnity limited to \$100,000 as set forth above, Himmelman and National Union expressly warrant, represent and agree that it is their express intent that this Agreement operate such that Himmelman and National Union hereby fully and forever waive, release, acquit and discharge WHM and the Creditors' Committee from any and all claims, demands, causes of action, liabilities, damages, costs expenses, fees (including attorney fees) and/or interest, of whatever kind and nature, whether known or unknown, concerning, related to or arising out of the Himmelman Claims and, in the case of National Union, claims National Union may have against the Creditors' Committee or WHM concerning, regarding, or related to the Policy, the Bankruptcy Cases or the Adversary Proceeding, whether known or unknown, arising at law, in equity or otherwise.

- d. Dismissal of Adversary Proceeding.** Subject to the terms and conditions herein, WHM and the Creditors' Committee warrant, represent and agree that they will seek dismissal with prejudice of the Adversary Proceeding, with each party to bear its own costs and attorney fees. This Agreement will not be valid and enforceable unless and until the Bankruptcy Court dismisses the Adversary Proceeding with prejudice, and said Order becomes final. The Adversary Proceeding shall be stayed until the Order approving this Agreement becomes a final, non-appealable Order or is modified, reversed or vacated on appeal. Once the Order approving the settlement becomes final and non-appealable, the Adversary Proceeding shall be immediately dismissed with prejudice, each party to bear its own costs and fees.
- e. Payment of Settlement Sum.** The Parties each warrant, represent and agree that National Union will make payment of the Settlement Sum into an interest-bearing escrow account within 30 days of the Bankruptcy Court approval of the Agreement. The Settlement Sum shall be released from the interest-bearing escrow account when the Bankruptcy Court's order approving this Agreement becomes final and non-appealable and the Adversary Proceeding is dismissed with prejudice. If the Bankruptcy Court's order approving this Agreement is modified, reversed or vacated on appeal, either in whole or in part, the Settlement Sum shall be released to National Union, this Agreement shall be void in all respects, including any releases contained herein, any injunctions imposed by the Bankruptcy Court's order shall be dissolved, National Union's obligations under the Policy will return in full force and effect, subject to the terms and conditions contained therein, and the Creditors' Committee and WHM may proceed with the Adversary Proceeding against Himmelman and Maloof.
- f. Order Approving Settlement Agreement.** This Agreement is subject to and conditioned on approval by the Bankruptcy Court and shall have no force or effect and shall be void if Bankruptcy Court approval is not obtained within 60 days after this Agreement is fully executed, which time period may be extended by written agreement of the Parties. The order submitted to the Bankruptcy Court for approval shall be in a form and substance reasonably acceptable to the Parties, and this Agreement is conditioned upon the inclusion of each of the following terms within the order entered by the Bankruptcy Court approving this Agreement (the "Approval Order"):
1. The Agreement is approved in all respects, and the terms thereof are incorporated therein by reference;
  2. Dismissal with prejudice of the Adversary Proceeding;
  3. A finding that the Adversary Proceeding was brought in good faith, without malice, and in compliance with the requirements of Rule 11.

4. The payment of the Settlement Sum is a covered Loss under the Policy, and after making the settlement payment and paying any defense costs incurred in the Adversary Proceeding, National Union's obligation under the Policy is extinguished; any persons are permanently enjoined from asserting in the Adversary Proceeding or any other action any claim against National Union seeking coverage under the Policy and arising out of or in any way relating to the transactions and occurrences described in the Adversary Proceeding or the Bankruptcy Cases.

N. The proposed compromise is fair and equitable and in the best interests of the Debtors, their estates and their creditors in that it (i) resolves the pending litigation and liquidates the claims against Maloof and Himmelman; (ii) eliminates the risks associated with litigation of the estates' claims against Maloof and Himmelman; (iii) prevents further erosion of the value in the potential recovery for the Debtors' estates under the Policy by terminating further litigation costs in the Adversary Proceeding; and (iv) results in a substantial infusion of cash into the Debtors' estates, without the necessity and expense of first obtaining final judgments against Maloof and Himmelman and then attempting to collect on such judgments.

O. The proposed compromise is the result of arms-length, good faith negotiations among parties who at all times were represented by competent and experienced counsel.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Motion is granted in all respects. Maloof's objection to the Motion is hereby overruled.

2. The terms of the Settlement Agreement, incorporated herein by reference, and the releases included therein, are hereby approved and the Movants are hereby authorized to enter into and perform thereunder.

3. The payment of the Settlement Sum is hereby determined to constitute a covered Loss under the Policy, and after making the settlement payment and paying any defense costs incurred in the Adversary Proceeding, National Union's obligation under the Policy shall be

extinguished and any persons are hereby permanently enjoined from asserting in the Adversary Proceeding or any other action any claim against National Union seeking coverage under the Policy and arising out of or in any way relating to the transactions and occurrences described in the Adversary Proceeding or the Bankruptcy Cases.

4. The Adversary Proceeding shall be stayed until this Order becomes a final, non-appealable Order or is modified, reversed or vacated on appeal. Once this Order becomes final and non-appealable, the Adversary Proceeding shall be immediately dismissed with prejudice, each party to bear its own costs and fees. If this Order is modified, reversed or vacated on appeal, either in whole or in part, the Settlement Sum shall be released to National Union, the Settlement Agreement shall be void in all respects, including any releases contained therein, any injunctions imposed by this Order shall be dissolved, National Union's obligations under the Policy will return in full force and effect, subject to the terms and conditions contained therein, and the Creditors' Committee and WHM may proceed with the Adversary Proceeding against Himmelman and Maloof.

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ORDER SUBMITTED BY:

/s/ Mark A. Phillips  
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Debtors and Debtors in Possession