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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM H. MALOOF,

07CV1902

Plaintiff,

vs.

Wednesday, December 12, 2007
10:15 a.m.

BT COMMERCIAL
CORPORATION, ET AL.

Defendants.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

1 APPEARANCES:

2 For the Plaintiff: David Eisler, Esq.

3
4 For Defendant BT
Commercial Corp.: Stephan J. Schlegelmilch, Esq.5 For Defendants Benesch,
6 Friedlander; Hill, and
Schwartz: Steve W. Tigges, Esq.7 For Defendant Denise
8 Burn: Tom Anastos, Esq.9 For Defendants Sues,
Sweet and Angart: William Dowling, Esq.10 For Defendants Richard
11 Jacobs/Richard Anter: Thomas R. Lucchesi, Esq.12 For Defendants John Rudd/
Newmarket: Ronald M. McMillan, Esq.13 For Defendant Walter
14 Himmelman: Eric J. Weiss, Esq.15 For Defendants Amerigas/
UGI Corporation: Patrick T. Lewis, Esq.16 For Defendant Kenneth
17 Seminatore: Alan Petrov, Esq.
Catherine Fazio, Esq.18 For Defendant/Intervenor
19 WHM Emprises: Mariann E. Butch, Esq.20 Official Court Reporter: Susan K. Trischan, RMR, CRR, FCRR
7-189 U.S. Court House
21 801 West Superior Avenue
Cleveland, Ohio 44113
22 216/357-708723 Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

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1 WEDNESDAY, DECEMBER 12, 2007

2 THE COURT: Good morning. Be seated.

3 Good morning. Will counsel for the plaintiff
4 William H. Maloof introduce himself for the record?

10:18:50 5 MR. EISLER: Yes, my name is David Eisler,
6 E-I-S-L-E-R.

7 THE COURT: All right.

8 MR. EISLER: I'm counsel for the plaintiff
9 William Maloof.

10:18:58 10 THE COURT: Would you also introduce the
11 person you have with you at counsel table?

12 MR. EISLER: Yes, this is the plaintiff,
13 William Maloof.

14 THE COURT: All right. And I'd like counsel
10:19:08 15 for each of the defendants to introduce themselves for the
16 record and indicate who they are representing.

17 I can start here at counsel table, but then I
18 understand that many of the defendants have counsel in the
19 jury box, so we'll move there then.

10:19:24 20 MR. McMILLAN: Yes. Good morning, your Honor.
21 I'm Ron McMillan and I represent John Rudd and Newmarket
22 Partners.

23 THE COURT: All right.

24 MS. BUTCH: Mariann Butch, and I represent the
10:19:36 25 debtors who have a motion to intervene in this case, Your

1 Honor.

2 THE COURT: All right.

3 MR. WEISS: Eric Weiss, Your Honor, on behalf
4 of Walter Himmelman.

10:19:44 5 MR. LEWIS: Patrick Lewis, Your Honor, on
6 behalf of Amerigas Propane and UGI Corporation.

7 THE COURT: All right.

8 MR. DOWLING: I'm William Dowling, I'm here on
9 behalf of defendants Sues, Sweet and Angart.

10:19:58 10 THE COURT: All right.

11 MR. PETROV: Alan Petrov on behalf of Ken
12 Seminatore.

13 THE COURT: All right.

14 MS. FAZIO: Catherine Fazio also on behalf of
10:20:06 15 Ken Seminatore.

16 THE COURT: All right.

17 MR. TIGGES: Good morning, your Honor. Steve
18 Tigges on behalf of Benesch, James Hill and Jeffrey
19 Schwartz. Thank you.

10:20:16 20 MR. ANASTOS: Good morning, Your Honor, Tom
21 Anastos on behalf of Denise Burn.

22 THE COURT: All right.

23 MR. LUCCHESI: Tom Lucchesi on behalf of
24 Richard Jacobs and Richard Anter.

10:20:26 25 MR. SCHLEGELMILCH: Stephan Schlegelmilch on

1 behalf of the bank defendants.

2 THE COURT: Looks like Mr. Seminatore needs
3 the most representation.

4 MR. TIGGES: Apparently so.

10:20:38 5 THE COURT: You know I'm just kidding.

6 All right. I inherited this case from Judge
7 Boyko. It was transferred to me. And I decided the best
8 way to get a start on it was to have the lawyers come in
9 because there already is quite a number of pleadings.

10:20:56 10 Now, I don't judge a case by the number of
11 pleadings other than that means it's a quite a bit of work
12 to get through, and so the best thing I could do is read, do
13 some reading preliminarily and then to bring the lawyers in
14 so I could get a handle on what's at issue.

10:21:16 15 I have three questions that I want the lawyers
16 to address this morning. And you don't all have to address
17 the issue. And then I'll get to more specific -- some of
18 the more specific things that are pending, but I thought the
19 best way for me to frame the issue was to just kind of pose
10:21:40 20 three, three questions. And I don't want long responses, as
21 you might imagine.

22 I just want to get the -- I know -- I think I
23 know some of the positions here based on pleadings, but I
24 want to get a better feel for it.

10:22:02 25 By asking the questions, it doesn't mean I've

1 formed any opinion at all what the outcome should be. I
2 mean that. But I want these addressed.

3 The first one is is there any reason why this
4 case should be transferred to Judge Aldrich? I understand
10:22:26 5 what plaintiff has said on that, but I want to hear -- I
6 want to hear very briefly on that issue.

7 The second: Is this case properly before the
8 District Court? I know some of you filed motions on that,
9 but I just want to hear -- hear a little bit on that.

10:22:46 10 And is this plaintiff the proper party to
11 bring such a suit, assuming it could be brought?

12 Those are the three kind of threshold issues.
13 I know there are a lot of parties. There are, you know, a
14 lot of -- lots of motions have been filed, but to me those
10:23:18 15 are kind of critical.

16 Should it be before Judge Aldrich?

17 Should it be in the District Court at all?

18 And that brings a host of related questions in terms of
19 whether the matter should be heard in the Bankruptcy Court
10:23:32 20 or whether it's premature or what have you, a range of other
21 things.

22 And then is the plaintiff the proper party?

23 Those are the three questions I have, which I
24 think we have to -- I have to get answered at the outset.

10:23:48 25 I don't mean necessarily I'll rule on them

1 today, but seems to me those are critical before we get into
2 the heart of the assertions which have been made in terms of
3 the fraud claims and the rest of it.

4 So I'll go to the plaintiff first, and I'm
10:24:06 5 really thinking more in the range of a very short span.
6 You've filed on this already. I understand you've indicated
7 there are a number of other things that she has ruled on,
8 appeals that have come from Bankruptcy Court, but take about
9 three minutes or less.

10:24:24 10 MR. EISLER: Very good, Your Honor.

11 Shall I go to the lectern?

12 THE COURT: Whatever -- if you're comfortable
13 speaking from there, you can speak from there or go to the
14 lectern, either one.

10:24:36 15 MR. EISLER: Okay. Thank you, Your Honor.

16 Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. EISLER: I'll address each question in the
19 order you asked them.

10:24:52 20 Is there any reason to transfer the case to
21 Judge Aldrich? Judge Aldrich has a great deal of experience
22 with this case, having heard easily a dozen or more appeals
23 that have been generated by the Level Propane proceedings.

24 Actually heard them, and there were several
10:25:16 25 more that had come before her that were dismissed by

1 agreement. So she's very familiar with the proceedings.
2 She's very familiar with the parties. She's very familiar
3 with the issues. And more importantly, she's familiar with
4 the issues that are before this Court respecting the
10:25:42 5 Continental Bank group and the other parties.

6 THE COURT: Why is she familiar with that?

7 MR. EISLER: Because there is now pending
8 before her an appeal of a motion to quash subpoena of John
9 Verbose which brings before her all of the issues of the
10:26:00 10 fraud claims because Mr. Verbose quashed a subpoena on the
11 premise that there was no prima facie case in the pending
12 motion to vacate before the Bankruptcy Court.

13 And that appeal is before Judge Aldrich, and
14 we have -- our brief has been submitted and a briefing
10:26:24 15 schedule has been triggered.

16 I think that a review of the designation of
17 the record from the Bankruptcy Court will indicate that
18 there is accord on the importance of that appeal.

19 THE COURT: Let me ask you this.

10:26:42 20 MR. EISLER: Yes.

21 THE COURT: Motion to vacate before a
22 Bankruptcy Court, is that still pending?

23 MR. EISLER: Yes, Your Honor, it is.

24 It hasn't even been heard yet, Your Honor.

10:26:56 25 THE COURT: Why wouldn't you await the results

1 or the outcome of the motion to vacate over there before you
2 filed this suit?

3 MR. EISLER: Your Honor, there was a time
4 limitation issue that arose here. There was the sale order
10:27:16 5 which was the last possible event that could give -- that
6 could -- that gave rise to this claim, the terminal event.
7 The sale order was June 27th, 2003.

8 We could not file after that and preserve the
9 claim.

10:27:34 10 THE COURT: Well, what kind of statute of
11 limitations?

12 MR. EISLER: Four year, it would be a four
13 year fraud or RICO statute. That --

14 THE COURT: All right. Go ahead.

10:27:48 15 MR. EISLER: Under any analysis, that would
16 probably be the outside.

17 THE COURT: All right. Go ahead.

18 MR. EISLER: So that being -- that being said,
19 it would be properly before Judge Aldrich because she is
10:28:02 20 extremely familiar with the issues here, and --

21 THE COURT: Has she been handling on a
22 seriatim basis all of the appeals that come from this case?

23 MR. EISLER: Yes, Your Honor.

24 THE COURT: From Bankruptcy Court?

10:28:18 25 MR. EISLER: Yes. Except for one that you

1 handled three years ago.

2 THE COURT: All right.

3 MR. EISLER: Is this properly before the
4 District Court? Yes. The short answer is yes.

10:28:36 5 THE COURT: How do you get around the
6 Bankruptcy Court where you filed a motion to vacate and you
7 still can come over here at the same time? What gives you
8 authority to do that?

9 MR. EISLER: Your Honor, at the time we filed
10:28:50 10 the motion to vacate, at the time that we filed the motion
11 to vacate, that was after this case had been filed.

12 There was a motion to vacate that we had filed
13 in June, 2006, which was appealed to Judge Aldrich after the
14 Bankruptcy Court denied it, and she had not ruled on that
10:29:20 15 motion to vacate.

16 The motion to vacate was based on what we had
17 at hand as of June, 2006. We had information that indicated
18 something was terribly wrong with this bankruptcy, and we
19 submitted the information we had to the Bankruptcy Court.

10:29:44 20 The case here was filed on July -- I'm
21 sorry -- on June 27th, which was the outside date to file
22 the fraud claim, prior to Judge Aldrich ruling on
23 August 16th in which she affirmed the ruling of the
24 Bankruptcy Court.

10:30:06 25 However, in so doing -- and I would give you a

1 reference for this, Your Honor. It is *Malooof versus Level*
2 *Propane*, Case Number 07-0153, and her opinion is the last
3 item on the docket.

4 In this opinion, Your Honor, she stated that
10:30:32 5 the Hazel-Atlas line of cases was the law that governed this
6 case; that the evidence, the only evidence that Mr. Malooof
7 had submitted was that the company had -- the going concern
8 assets of the company had been sold, and she stated
9 specifically that that sale standing alone was not a reason
10:31:02 10 to vacate the sale.

11 She said any further evidence that Mr. Malooof
12 has, he should take to the Bankruptcy Court, and if the
13 Bankruptcy Court denies the motion, despite the fact that
14 the evidence supports a motion to vacate, she would likely
10:31:16 15 overrule it as clear error.

16 With that, that was a very strong indication
17 that I should take the material that we have subsequently
18 been able to gather and present it to her -- present it to
19 the Bankruptcy Court so there was a Bankruptcy Court record.

10:31:40 20 THE COURT: Then you should appeal that,
21 right? Then you could appeal that.

22 That's what she was talking about, right?

23 MR. EISLER: Well, it hasn't been -- yes, we
24 could appeal, we could appeal that.

10:31:52 25 However, there was still the four year statute

1 to preserve and there was no way of getting around that
2 statute, which is why we had filed the motion to stay here.

3 Now, it is entirely -- given the state of the
4 pleading, we have asserted that the bankruptcy was part of a
5 larger course of conduct.

10:32:14 6 THE COURT: You're not including the Judge in
7 on that.

8 MR. EISLER: I'm sorry, your Honor?

9 THE COURT: You're not including the Judge in
10 on that.

11 MR. EISLER: No, Your Honor, not at all.

12 THE COURT: All right.

13 MR. EISLER: Absolutely not.

14 THE COURT: Which Judge was on it?

10:32:32 15 MR. EISLER: That would be Judge Baxter was
16 the Bankruptcy Judge.

17 I believe that these courses of conduct
18 created a situation -- created one situation after another
19 that in Bankruptcy Court gave a plausible basis for the
10:32:56 20 Judge's rulings. And the Bankruptcy Court has to rely on
21 counsel, because so much of what occurs in Bankruptcy Court
22 is a result of agreement. Otherwise, the Bankruptcy Court
23 simply couldn't run.

24 THE COURT: But there are no technical rules
10:33:14 25 that preclude you from being here at this time? That's what

1 you're saying.

2 MR. EISLER: To my mind --

3 THE COURT: No hurdles you have to overcome.

4 There are no -- what arguments do you anticipate from the

10:33:24 5 lawyers who are going to get up after you that you

6 should --

7 MR. EISLER: Their arguments, their arguments

8 will be basically collateral attack and res judicata. And

9 my position is that the fraud overwhelms all that since

10:33:42 10 these cases, the rulings issued from the Bankruptcy Court,

11 which is an adjunct of this Court, and this Court as such

12 has authority to rule respecting those matters, and it not

13 being collateral since it's the same Court.

14 THE COURT: All right. Go ahead and address

10:34:06 15 the issue as to Mr. Maloof as the plaintiff here.

16 MR. EISLER: Thank you, Your Honor.

17 The plaintiff is the proper party. He made a

18 demand to the corporation, the debtors, if you will, and he

19 has also specifically pled under Rule 23.1, Federal Rules of

10:34:30 20 Civil Procedure, that any attempt to engage the corporation

21 in a lawsuit of this kind would be utterly futile,

22 especially given the history of resistance that the debtors

23 had to any notion that there was anything improper in the

24 bankruptcy or there was anything to investigate.

10:34:52 25 In fact, at any -- at every turn where there

1 was any thought to investigate the matters in the Bankruptcy
2 Court -- and this goes back to 2003 -- the debtors
3 vigorously resisted that.

4 They resisted the appointment of the Examiner.
10:35:16 5 They sought to amend the Examiner's report. They objected
6 to numerous items in the Examiner -- in the Examiner's
7 report. And they also resisted any attempt to reopen the
8 Examiner's report when conduct after the scope of his
9 investigation were discovered.

10:35:40 10 THE COURT: Now, if I understand it correctly,
11 Mr. Maloof was the sole shareholder of -- is it WHM, is that
12 right?

13 MR. EISLER: That's correct, Your Honor.

14 THE COURT: And WHM was the owner or sole
10:36:00 15 shareholder of these other companies, other plaintiff
16 companies which seek to intervene, is that right?

17 MR. EISLER: That's correct, your Honor. He
18 was the owner, sole shareholder of WHM, and through WHM the
19 sole shareholder of all of the other enterprises.

10:36:16 20 THE COURT: All right. You don't anticipate
21 any standing issues or problems?

22 MR. EISLER: Respecting his sole shareholder
23 status? They will -- they will assert that he did not
24 properly make demand of the corporation to pursue this
10:36:38 25 matter, but under Rule 23.1, if it is futile to make demand

1 of the corporation, then it is permissible to go -- it is
2 permissible to go forward so long as you specifically plead
3 that.

4 That is in the rule.

10:37:00 5 THE COURT: All right. Okay.

6 That's -- that's probably sufficient at this time.

7 I just wanted to get a little bit of
8 discussion going. And so I may or may not come back to you
9 for a little bit more.

10:37:14 10 I'm not going to take inordinately long on
11 this phase of things, but I wanted to hear from you. So you
12 may take your seat now.

13 MR. EISLER: Thank you, Your Honor.

14 THE COURT: I understand all lawyers probably
10:37:30 15 don't want to speak and you may not all be similarly
16 situated, but if there's anyone who wants to take the lead
17 on just kind of generally addressing those three issues,
18 feel free.

19 MS. BUTCH: Your Honor, my name is Mariann
10:37:46 20 Butch, and I represent the debtors.

21 However, as much as I'd like to take the lead
22 in this, our motion to intervene is still pending. And --

23 THE COURT: That's all right.

24 MS. BUTCH: All right. Your Honor, I think
10:38:00 25 that if I addressed them from the bottom up, I could also

1 discuss the pending motion to intervene.

2 The first is whether or not the plaintiff is
3 the proper party to this case, and the answer to that
4 question is clearly no and is the subject basically of our
10:38:14 5 motion to intervene.

6 The fact of the matter is is that all the
7 claims that he attempts to assert are the property of the
8 debtors' estate. And, moreover, I would refer the Court to
9 the ruling by Judge Baxter that came out, and we submitted
10:38:34 10 it as a supplement which specifically rules in response to
11 Mr. Maloof's motion to dismiss the counterclaim in the
12 adversary proceeding that's basically the same issues that
13 he raises yet again here, that that Court found that, in
14 fact, the causes of action that he is attempting to assert
10:38:56 15 are the property of the estate.

16 So in fact, they are not the proper party and,
17 in fact, to the degree that those claims are meritorious, as
18 Judge Baxter noted they would be the property of the
19 debtors' estate.

10:39:12 20 Now, not only did Mr. Maloof not make proper
21 demand on the corporation, but the fact of the matter is
22 this lawsuit is an attempt to bypass the Bankruptcy Court in
23 that Mr. Maloof never attempted to seek to have the claims
24 abandoned by the Bankruptcy Court, nor did he seek to lift
10:39:34 25 the stay to have these claims asserted.

1 So is this case properly before this Court?
2 We would answer no, it is not properly before this Court.
3 It's been brought in other forums, and it is more properly
4 to be decided by the Bankruptcy Court.

10:39:50 5 And finally, is there any reason that this
6 motion should be transferred to Judge Aldrich? We would
7 argue that if the Court allows -- grants debtors' motion to
8 intervene and starts with the debtors' motion to dismiss,
9 the Court can simplify this matter and rule on a motion to
10:40:08 10 dismiss without requiring transfer to Judge Aldrich because
11 the facts, as I just briefly went over as a matter of law,
12 require the dismissal of this case.

13 THE COURT: Okay. Let me just ask you, in
14 terms of Judge Baxter's ruling, what date was that?

10:40:24 15 MS. BUTCH: I have a copy here that I can give
16 the Court, Your Honor.

17 It was September 14th, 2007.

18 THE COURT: Was there any appeal of that or
19 would that be premature? An appeal of it?

10:40:42 20 MS. BUTCH: There was no appeal in that it
21 would be premature.

22 THE COURT: Okay. Anybody else then?

23 Okay. So on the issue of Judge Aldrich, let
24 me just ask this question: Has she been the Judge who's
10:41:10 25 been hearing each of these matters as they come from this

1 proceeding or as they relate to this matter?

2 MS. BUTCH: Judge Aldrich has had involvement.
3 Whether she's heard them all or not, I can't dispute
4 Mr. Maloof's representation that she has heard the bulk of
10:41:28 5 them.

6 THE COURT: Okay. And your basic argument is
7 that you should, one, be allowed to intervene, but also that
8 the matter should be dismissed?

9 MS. BUTCH: Correct, Your Honor.

10:41:42 10 THE COURT: And what were the options now for
11 Mr. Maloof before the Bankruptcy Court if he were to pursue
12 them?

13 You say he never filed a motion to abandon?

14 MS. BUTCH: He could have sought abandonment.
10:41:56 15 He could have sought leave.

16 There is an action pending, an adversary
17 proceeding started by the debtors to pursue the fact that
18 Mr. Maloof never, in fact, took any of those options. And
19 he has placed a counterclaim in that action for the very
10:42:14 20 same things that we see pending in this Court.

21 THE COURT: Now, if, if he filed a motion to
22 abandon, still would he have had standing to do that? I
23 guess would he have a right to pursue the claims if they are
24 abandoned?

10:42:34 25 MS. BUTCH: It was an option that he could

1 have pursued, yes, Your Honor.

2 And I believe if you take a look, that that
3 issue is briefed in the -- the bank debtors' motion to
4 dismiss.

10:43:10 5 THE COURT: So your response to my three
6 questions, one, is Aldrich -- well, maybe yes, maybe no, but
7 in regard to whether this should be before the District
8 Court, I guess your answer is no.

9 But is your answer no because Maloof isn't the
10:43:38 10 proper property, or is it more than that?

11 MS. BUTCH: No, I think it's more than that,
12 Your Honor.

13 I think when you look at the issues and the
14 res judicata issues that he raised in terms of how many
10:43:50 15 times these very same issues have been presented in
16 Bankruptcy Court and other Courts and have been ruled
17 upon --

18 THE COURT: The fraud issue?

19 MS. BUTCH: Yes.

10:43:58 20 And I think again I would refer you -- I know
21 that our brief did not go in depth into the merits believing
22 that there was a basic issue of whether it was properly
23 before the Court, but I think those arguments are clearly
24 raised in the bank parties' motion.

10:44:14 25 THE COURT: All right. So basically you're

1 saying if we look at your motion and we look at the bank's
2 motion, that together all of those arguments that you think
3 are pertinent have been raised and set out?

4 MS. BUTCH: I believe so, Your Honor.

10:44:34 5 THE COURT: All right. Okay. I'm going to
6 grant your motion to intervene.

7 I think it makes sense that whatever the
8 issues are, I should have -- Mr. Maloof has a position on
9 this, and if companies, through counsel, have a position on
10:45:14 10 it, I think that it's a clash between those two which should
11 give me some sense of where -- where I should come out.

12 I think that sharpens the issue, sharpens the
13 focus. And without ruling on the merits of any motion to
14 dismiss or whether the intervenors' motion would be
10:45:38 15 well-taken, I think that I would benefit -- benefit from
16 presentation of both the plaintiff, in terms of his position
17 and why he is in a position to pursue these matters, and
18 also hear from the other side.

19 And I think that I shouldn't shy away from
10:45:54 20 receiving that information. So I would grant that at this
21 time.

22 I'll still have to consider the motion to
23 dismiss, and I'm not prepared to rule on that, but I
24 understand your argument.

10:46:08 25 Why do you want me, Mr. Maloof, to stay the

1 action? Why would I stay it if you want to pursue something
2 over here? You think -- I know the other side has argued
3 that it wouldn't necessarily moot everything out, but why do
4 you want me to hold up?

10:46:32

5 MR. EISLER: Your Honor, I would want you to
6 hold up because the motion to -- the motion to vacate would
7 determine all of these res judicata and collateral estoppel
8 issues.

10:46:52

9 THE COURT: So if they would, if the motion to
10 vacate is granted, then you're satisfied. But if the motion
11 to vacate is denied, then what do you do? You appeal that,
12 or do you still want to go forward over here?

13 MR. EISLER: I would appeal it, Your Honor.

10:47:06

14 THE COURT: Then why do you need -- why do you
15 need this? Why do you need this lawsuit?

16 MR. EISLER: Because in order to -- simply in
17 order to preserve the statute. If --

10:47:20

18 THE COURT: The statute, if you're not going
19 to pursue anything here but you're going to pursue it
20 through the process of the Bankruptcy Court, you don't need
21 to preserve the statute because you've already presented the
22 issues over there.

23 MR. EISLER: Well, Your Honor, the problem is
24 that we're pursuing a motion to vacate there.

10:47:32

25 THE COURT: Right.

1 MR. EISLER: And we're pursuing damages here,
2 which are two entirely different remedies.

3 THE COURT: And you're allowed to -- you're
4 allowed to -- so tell me what you anticipate.

10:47:48 5 MR. EISLER: What I anticipate would be that
6 provided the motion to vacate is granted, then the defenses
7 that the defendants have put forward would not be available
8 to them, and then we would be free to pursue our damages
9 here.

10:48:10 10 THE COURT: Wouldn't you do that before the
11 Bankruptcy Court once they vacate?

12 I don't pretend to know, you know, all the ins
13 and outs of the Bankruptcy Court proceedings, but, you know,
14 if you vacate, then wouldn't you be back before them, the
10:48:28 15 Bankruptcy Judge, pursuing whatever remedies that you
16 thought were appropriate over there?

17 MR. EISLER: The available remedies there are
18 different from the available remedies here.

19 What I can do for -- in the Bankruptcy Court
10:48:42 20 is pursue a motion to controvert the Chapter 7 because the
21 agreed order was entered into perhaps a week after the
22 involuntary bankruptcy was filed.

23 This wasn't -- this bankruptcy did not begin
24 its life as a Chapter 11.

10:49:00 25 THE COURT: I understand.

1 MR. EISLER: It began its life as a Chapter 7,
2 an involuntary Chapter 7, and the motion to controvert
3 the -- the motion to controvert has limited remedies
4 attached to it. And other parties that may be responsible
10:49:26 5 wouldn't be part of that remedy.

6 THE COURT: So you want me to set -- if you
7 get -- if your motion to vacate is denied, what do you do
8 then?

9 MR. EISLER: I would appeal it.

10:49:38 10 THE COURT: And what do I do?

11 MR. EISLER: I would ask you to continue the
12 stay.

13 THE COURT: Just set it here, hold the case
14 until you get done over there?

10:49:50 15 MR. EISLER: That's right, Your Honor.

16 THE COURT: And if you win, then is there any
17 res judicata effect to your winning?

18 MR. EISLER: I'm sorry, Your Honor?

19 THE COURT: Is there any res judicata effect
10:50:04 20 to your winning if you win over there? You come over here.
21 What do you --

22 MR. EISLER: Yes, Your Honor. I would
23 anticipate that if I win over there, if I win the motion to
24 vacate, then all of the releases, all of the sales, all of
10:50:18 25 the orders, all of the agreements upon which the various

1 parties are relying would no longer be available to them,
2 and I could pursue this simply as a fraud claim. And there
3 would be no debtors to intervene.

4 THE COURT: You got any response to that, any
10:50:42 5 light you can shed on what he said in response?

6 MS. BUTCH: Your Honor, I don't know that I
7 have any light I can shed on that other than the fact that
8 we would respectfully disagree with the two bite at the
9 apple approach and the attempt to litigate over there and
10:51:00 10 then take another bite in this courtroom, which is
11 essentially what I think he's trying to say.

12 But in terms of his rights and his ability to
13 claim that the entire bankruptcy had been vacated and that
14 that perpetrated a fraud, that gets to the merits of the
10:51:18 15 case that I think are not the central issue before this
16 Court in deciding whether or not to hold the Court -- or
17 hold this matter before it.

18 THE COURT: All right. But if he goes back
19 before the Bankruptcy Court and his motion to vacate is
10:51:36 20 denied, what are his options; to appeal it?

21 MS. BUTCH: Yeah. I would imagine so.

22 If anybody from the galley would like to chime
23 in, they may feel free.

24 THE COURT: Does he have -- you agree that's
10:51:54 25 his right to be in Bankruptcy Court and also to be out here

1 bringing a lawsuit? There are no prohibitions on that?

2 Yes.

3 MR. EISLER: Your Honor, I would say that this
4 lawsuit is a lawsuit regarding courses -- fraudulent courses
10:52:28 5 of conduct.

6 The motion to vacate is a motion to get out of
7 or negate certain judgments, and as such there's not two
8 bites at the apple.

9 THE COURT: Well, you are kind of
10 circumventing the Bankruptcy Court.

11 MR. EISLER: I'm sorry, Your Honor?

12 THE COURT: You're kind of circumventing the
13 Bankruptcy Court, right?

14 MR. EISLER: I can't hear you, Your Honor.

10:53:02 15 THE COURT: You're kind of circumventing the
16 Bankruptcy Court, aren't you? I mean, the Bankruptcy Court
17 is over there hearing these matters, trying to determine,
18 you know, rights, claims, you know, and so to the extent
19 that you can just walk out of there and come over here, as a
10:53:18 20 practical matter doesn't that mean that you're just going
21 right around the Court?

22 MR. EISLER: I --

23 THE COURT: I mean, it just appears that way.

24 MR. EISLER: No, it may, it may appear that
10:53:32 25 way, but I don't think we are because the fraud was not

1 simply in the Bankruptcy Court, but occurred -- the
2 bankruptcy itself was fraudulent and we're challenging the
3 validity of the entire bankruptcy.

4 THE COURT: And you don't raise that with
10:53:50 5 the -- you don't raise those issues with the Bankruptcy
6 Judge; that you think that what they did constituted fraud
7 and, therefore, you should be given some relief in the
8 Bankruptcy Court?

9 MR. EISLER: The only place I can go is to
10:54:06 10 challenge the conversion order after the bankruptcy was
11 filed, and after the -- and in the event that the motion to
12 vacate is granted, I would have the ability to pursue a
13 controversion action which would allow the former debtors to
14 assert various rights and remedies, basically three times
10:54:44 15 their expenses and damages arising from the filing of the
16 Chapter -- involuntary Chapter 7.

17 THE COURT: All right. What I see as my way
18 of proceeding is, first, to look at those three issues that
19 I've raised in the context of briefing that's been put in
10:55:06 20 front of me because they are threshold, and so I'll be
21 looking at the briefing relative to the issue of should it
22 be transferred to Judge Aldrich. I don't think that's a
23 long exercise.

24 And then the other would be whether -- the two
10:55:28 25 other issues, whether the plaintiff is the proper party and

1 whether the plaintiff is properly here in the District
2 Court, period.

3 And then after kind of a ruling on those basic
4 issues, then to the extent that there are other issues
10:55:50 5 raised, you know, I'll address them.

6 But that's kind of, I think, the best -- best
7 approach that I can think of, because rather than trying to
8 plow through every single argument that's been raised up
9 front, we've got to start kind of somewhere. And to me,
10:56:10 10 that's the best start.

11 And then there are issues about whether, you
12 know, a RICO claim has been properly asserted or, you know,
13 the failure to state a claim in other respects, those kinds
14 of things, but I think that the broader issues kind of have
10:56:28 15 to be addressed up front.

16 Now, yes.

17 MR. PETROV: Your Honor, Alan Petrov.

18 For your benefit, I think some of the other
19 counsel were here at a hearing in the summer before Judge
10:56:42 20 Boyko, and I may not remember this exactly correctly, but it
21 was a transcribed hearing and I believe Judge Boyko
22 mentioned at that hearing that he had discussed with Judge
23 Aldrich the question of transfer, and that she reported to
24 him that she was not interested in this case.

10:57:00 25 So I mention it only so you know that as past

1 history.

2 THE COURT: No, it's important to know. I
3 mean, there are -- there's a transfer rule which the Judges
4 can actually discuss a case and decide whether it appears to
5 be one that should be transferred.

10:57:18

6 There's also the local rule which kind of lays
7 out, you know, that related cases should be transferred.
8 But it's not a hard and fast rule, and obviously this is a
9 discreet matter, so it's not exactly the same matter that
10 was in front of her. And so I don't think it's a mandatory
11 transfer at all.

10:57:34

12 There would be some cases that I would almost
13 put in the mandatory category, you know, a case that
14 somebody dismisses off of a docket and it comes back somehow
15 to the Court, or involves exactly the same accident or some
16 other matter, you know, that kind of thing.

10:57:52

17 So I think there's a measure of discretion
18 involved here, but I do appreciate that because I haven't
19 talked to her about what her position would be on it, but
20 Judges are allowed to confer on that to work out a
21 determination. I appreciate the comment.

10:58:20

22 And there was a transcribed hearing before
23 Boyko which I should probably review, as you said.

24 What date was that hearing, does anybody
25 remember? I know it's on the docket but --

10:58:40

1 MR. PETROV: I think it was in July, maybe. I
2 don't know.

3 THE COURT: Okay.

4 MR. PETROV: Summer. It was warm outside.

10:58:48 5 THE COURT: Okay. I could easily get that.

6 All right. Now --

7 MR. EISLER: Your Honor.

8 THE COURT: Was there something else?

9 MR. EISLER: Yes, Your Honor.

10:58:54 10 THE COURT: Yes.

11 MR. EISLER: Speaking to that, I would ask you
12 to read the transcript carefully in light of that. It was a
13 very charged proceeding, for lack of a better word.

14 THE COURT: Well --

10:59:22 15 MR. EISLER: There was a great deal of tension
16 there.

17 THE COURT: Well, I understand.

18 And he transferred the case.

19 MR. EISLER: That's right.

10:59:30 20 THE COURT: But it still seems to me what he
21 had to say relative to the transfer and other motions would,
22 you know, would still be something that's relevant.

23 Bear in mind that I feel like I can read
24 anything he said or you said or anybody else said and still
10:59:48 25 maintain the kind of neutrality that I need in order to

1 decide the issues, so you shouldn't be concerned about that.

2 MR. EISLER: Okay. Thank you, Your Honor.

3 THE COURT: Now, you do have -- you did have a
4 motion for a reconsideration order imposing sanctions
5 related to the motion to transfer.

11:00:04

6 I take it that was addressed to him. I'm not
7 the -- I think that's between you and Judge Boyko. Did you
8 appeal that? You sought to appeal that to the Circuit?

9 MR. EISLER: Yes, I did, Your Honor.

11:00:18

10 THE COURT: Okay. And they -- what did they
11 determine; that it was premature, or what was the ruling?

12 MR. EISLER: That's right, Your Honor.

13 THE COURT: Okay. I think you're going to
14 have to let that stay, and then when this is all said and
15 done, whatever is the appropriate time, you'll have to
16 appeal that.

11:00:30

17 I don't think it's appropriate for me to
18 consider a sanction that he imposed. It's a sanction that
19 he imposed growing out of comments or references made to him
20 that he felt were inappropriate, as I understand it, and I
21 don't -- I wasn't in his shoes. I don't think I can be in
22 his shoes and I don't think I can be in a position of
23 judging what he did as my colleague.

11:00:48

24 So I would rather say -- I would rather say at
25 this time, and I will, that, you know, if you want to confer

11:01:10

1 with him and he has some sense that he wants to indicate to
2 me that he thinks what he did wasn't well-taken and he would
3 like me to reverse that, I would. But other than that, I
4 think it's proper that you appeal it and take it up when
5 you -- if you wish, at the appropriate time.

11:01:40

6 And obviously I have no problem with that. I
7 think that's entirely appropriate.

8 But I think that, because that was something
9 before him specifically involving him, I would leave it at
10 that.

11:02:00

11 Let me look down the list of motions here for
12 a moment. Obviously the motions to dismiss, which are
13 various, a motion to stay by the plaintiff which I'll -- may
14 in due time have to rule on.

11:02:26

15 There's an intervenors' motion to file
16 supplemental authority, 110, which I'll grant.

17 And there are motions to -- for extension of
18 time to answer the complaint 30 days after all pending
19 motions have been decided. One is docket entry 119. I
20 would -- I will grant that subject to possibly modification
21 of it after I do my preliminary assessment, but I'll grant
22 the motion.

11:03:20

23 MR. LUCCHESI: Your Honor.

24 THE COURT: Yes.

11:03:32

25 MR. LUCCHESI: On that one I believe you were

1 referring, 119 is Richard Anter's motion. There was another
2 one, docket number 73, identical motion filed
3 September 11th --

4 THE COURT: Okay.

11:03:44 5 MR. LUCCHESI: -- on behalf of Dick Jacobs and
6 just before this case was transferred to you, Judge
7 Boyko's -- Judge Boyko ruled on that motion and made a
8 mistake in ruling on it.

9 I had contacted his secretary I think that was
11:04:00 10 filing the motions electronically, or the rulings, and she
11 told me he wasn't supposed to rule on it. She was going to
12 undo it. He granted the wrong number I think is exactly
13 what she told me.

14 THE COURT: And it was vacated I believe.

11:04:20 15 MR. LUCCHESI: She said look back at 73, and
16 119 -- I think 73 and 119 are the same.

17 THE COURT: I'll grant it. I won't leave it
18 in that position forever, but I think I'll grant it at this
19 time because of the way I framed the issue.

11:04:32 20 MR. LUCCHESI: Right. And I probably get the
21 award for being the laziest of the lawyers. I didn't want
22 to file an answer. I decided to let things take their
23 course because my clients are in a little different position
24 than everybody else.

11:04:44 25 THE COURT: All right. Then so I'm going to,

1 to the extent that the plaintiff's motion for
2 reconsideration of imposing sanctions is addressed to me,
3 docket 128, I would deny that.

4 Now, plaintiffs filed a motion for extension
11:05:22 5 of time to oppose Seminatore motion to dismiss, sought until
6 12/3/07. That time has now passed. There was nothing
7 filed, so what is your -- what's your position on that?

8 MR. EISLER: Your Honor, there was an
9 opposition to the motion of 11/15 on behalf of Seminatore,
11:05:48 10 so I was -- I didn't -- I was not at all sure what to do
11 with respect to that.

12 THE COURT: Well --

13 MR. EISLER: So if I could get leave to, it
14 would be a very short response, if I could have leave to
11:06:06 15 file something instanter.

16 THE COURT: You want seven days?

17 MR. EISLER: That would be fine, Your Honor.

18 THE COURT: All right. That's docket 95.

19 MR. EISLER: Okay.

11:06:14 20 THE COURT: So seven days from now is the
21 19th.

22 MR. EISLER: Very good, Your Honor. Thank
23 you, sir.

24 THE COURT: Okay. There was a defendant
11:06:28 25 motion, LaSalle motion to withdraw and substitute counsel,

1 docket 141, and I would grant that motion.

2 There was defendant's motion to strike
3 plaintiff's opposition to Himmelman's motion to dismiss,
4 that's docket entry 144. And the argument is basically that
11:07:14 5 plaintiff's opposition was untimely by 30 days, and that
6 appears to be true.

7 Mr. Eisler, what do you have to say about
8 that?

9 MR. EISLER: Your Honor, I had filed with the
11:07:26 10 motion -- I had filed in the opposition a request for leave
11 to plead instanter.

12 MR. WEISS: Your Honor, on behalf of
13 Mr. Himmelman, I don't believe the docket reflects any
14 motion for leave filed with the opposition.

11:07:42 15 There's a brief phrase in the opposition, some
16 reference to excusable inadvertence or something to that
17 effect, but as set forth in our motion to strike there's no
18 affidavits, no evidence, no motion for leave or nothing else
19 that would be required under Civil Rule 6(b) that would
11:08:02 20 allow plaintiff to file out of Rule like that.

21 THE COURT: All right. Let me say this so I'm
22 clear, Mr. Eisler, we're just starting out on this so I want
23 to lay out some strong, clear rules.

24 I'm going to overrule the motion to strike,
11:08:20 25 but let me say this. I don't take lightly the notion that a

1 party shouldn't be held to some rules. And we're not
2 talking about one day or two days. I mean, you really put
3 yourself in a vulnerable position when you sit and something
4 goes out 30 days. Anything could happen to you in 30 days,
5 and so that's a pretty serious period of time.

11:08:48

6 MR. EISLER: I understand, Your Honor.

7 THE COURT: So I'm not going to countenance
8 that here.

9 Things are contentious enough, and that's
10 fine, and the issues are serious, but I'm not going to be
11 allowing that kind of thing.

11:09:00

12 So but I like lawyers to know that and
13 understand that -- you should know it already -- but to know
14 and understand it so that when I say that you can't file
15 something or I'm not going to allow it, it may cut in a very
16 harsh way, but I will have already made clear that that's
17 likely.

11:09:16

18 So you've got to cover yourself as a lawyer in
19 every circumstance, and certainly you can't be without a
20 motion, but you shouldn't be caught looking back. You
21 should always be looking forward with your motions. So I
22 just want to be clear about that.

11:09:34

23 But I'm going to -- I'm going to strike the
24 motion with that caveat, that it's not going to be tolerated
25 going forward. That's 144.

11:09:50

1 And then Seminatore filed a motion for
2 extension of time to file a reply, 147, seeks extension to
3 12/28/07, and I will grant that motion 147.

4 And then there is 149, defendant's motion to
11:10:20 5 strike plaintiff's second opposition to motion to dismiss,
6 149, and there's an argument that plaintiff filed second
7 untimely opposition, and that appears to be true as well.

8 MR. EISLER: Your Honor, may I speak to that?

9 THE COURT: Sure.

11:10:46 10 MR. EISLER: That was by inadvertence. I
11 would like for leave to withdraw the second response and for
12 leave, and I would like to file a motion for leave to file
13 additional argument in response to Mr. Tigges' motion to
14 dismiss.

11:11:08 15 THE COURT: Well, how do you -- why are
16 you --

17 MR. EISLER: I had filed an opposition. It
18 was -- it was -- there are so many motions to dismiss that
19 it was simply an arithmetic error.

11:11:24 20 THE COURT: You didn't file the right thing?

21 MR. EISLER: I filed something -- I filed
22 basically, and I had already filed an opposition so I would
23 like leave to file that as --

24 THE COURT: Okay.

11:11:36 25 MR. EISLER: -- an additional argument.

1 THE COURT: So I should just grant -- I should
2 just grant the motion to strike second opposition as
3 unopposed, 149, since you say that.

4 MR. EISLER: Well, what I would like to do is
11:11:52 5 refile an additional argument.

6 THE COURT: Refile the same thing?

7 MR. EISLER: Refile the same thing as
8 additional argument.

9 THE COURT: Well, what's the use then? Seems
11:12:04 10 like you should be arguing that I should just deny their
11 motion because if I -- if I strike it and then allow you to
12 come back and file exactly the same thing, that's just a
13 waste of paper.

14 MR. EISLER: My only problem is that I had
11:12:26 15 incorporated that argument by reference in another pleading,
16 so I would ask to amend that pleading to incorporate that
17 argument.

18 THE COURT: I'm not quite sure, I guess
19 because I'm not looking at it, but I'm not quite sure what
11:12:42 20 you're saying.

21 Did you file the second opposition? Did you
22 want to put that argument in front of me, the one that you
23 put in the second opposition?

24 MR. EISLER: Yes, Your Honor. I would
11:12:52 25 like -- if I may address it in writing since the time

1 to -- since the motion to strike was just filed yesterday?
2 And I could explain myself clearly in the writing.

3 THE COURT: Well, you want to just file
4 something else?

11:13:16 5 MR. EISLER: I would just file a -- I would
6 file -- I would like time to file an opposition to that,
7 yes, Your Honor.

8 THE COURT: Now, I'm trying to save time --

9 MR. EISLER: I understand.

11:13:26 10 THE COURT: -- here, and I'm not trying to
11 take away response time. But when you start doing response
12 time to motions for extension of time to strike, that's --
13 you know, sometimes that's just a lot of wasted time.

14 So I'm trying while we're here to get an
11:13:44 15 understanding on whether you oppose that motion to strike.

16 MR. EISLER: To the -- to the extent that it
17 takes away my arguments from the record, yes, I do.

18 THE COURT: So would you -- so you would just
19 as soon have me consider them, is that what you want?

11:14:08 20 MR. EISLER: Yes, that's what I'm saying. And
21 I would file an opposition to that since I have time to do
22 so anyway.

23 It was just filed yesterday.

24 THE COURT: I'm not talking about the motion
11:14:18 25 to --

1 MR. EISLER: Okay. I'm sorry.

2 THE COURT: -- strike.

3 I'm talking about the merits of the motion.

4 They've said that you filed an untimely

11:14:28 5 opposition, this second opposition to motion to dismiss.

6 Based on the fact it was untimely, they are asking me to

7 strike it.

8 MR. EISLER: I would consent to it as

9 unopposed, but I would be asking for leave to amend another

11:14:44 10 opposition that included that argument by reference.

11 THE COURT: Exact same argument?

12 MR. EISLER: The exact same argument but it

13 was in another pleading that I included by reference to

14 that, that second opposition.

11:14:58 15 THE COURT: Why don't we just leave this one

16 on and then be done with it?

17 MR. EISLER: Thank you, Your Honor.

18 THE COURT: I mean, it just makes it

19 more -- I'm going to deny the motion to strike your

11:15:08 20 opposition and we will just leave it as it is.

21 MR. EISLER: Thank you, Your Honor.

22 THE COURT: Because there's no reason to be

23 striking something and then having you file the same thing

24 all over again.

11:15:18 25 You know, I just don't want to do that.

1 So with the same caveat before, if you are
2 coming in here with late pleadings like this, don't be
3 surprised that I'm going to grant these motions going
4 forward.

11:15:34 5 MR. EISLER: I understand that, Your Honor.

6 THE COURT: All right. But I'm going to
7 deny -- I'm going to deny 149.

8 And that cleans up some of the record.

9 I would like the intervenors to address one of
11:16:00 10 their motions for me. The intervenors have a motion to stay
11 the action ex parte and it argues the Bankruptcy Code,
12 Section 362(a)(3) requires an automatic stay of the case.

13 This is a little different take on the stay
14 argument. Plaintiff already asked for a stay but the
11:16:22 15 intervenor, as I understand it, in docket number 12, ECF
16 number 12, made that argument.

17 Could you address that?

18 MS. BUTCH: I believe our argument there, Your
19 Honor, is the fact that the exact same issues are pending in
11:16:38 20 the adversary proceeding and in the bankruptcy -- raised in
21 the Bankruptcy Court is that -- and because he did not seek
22 relief from stay from the Bankruptcy Court, that this motion
23 should be paid -- stayed pending the outcome of those.

24 THE COURT: Well, which one of your motions do
11:17:02 25 you want me to grant? I mean, if you want me to stay the

1 case, I mean, it will be sitting here. You also filed a
2 motion to dismiss.

3 MS. BUTCH: I think, Your Honor, quite
4 frankly, we would rather that the case be dismissed.

11:17:18 5 THE COURT: Right. I know. But -- but if it
6 should be stayed, it shouldn't be dismissed, right?

7 MS. BUTCH: Pardon?

8 THE COURT: I say if it should be stayed, it
9 shouldn't be dismissed, right?

11:17:32 10 MS. BUTCH: I believe it was in the
11 alternative, Your Honor.

12 THE COURT: Right. But isn't the
13 stay -- well, which -- which one --

14 MS. BUTCH: We believe that it would simplify
11:17:44 15 all matters for this Court and the other Courts if the Court
16 first took a look at the motion to dismiss and determined,
17 as we've advocated, that it's improper for it to be here.

18 However, in the alternative, if the Court
19 finds that dismissal is inappropriate, then we would ask
11:18:00 20 that the matter be stayed pending the outcome.

21 THE COURT: Okay. I'll take a look at it.

22 I know in the other stay kinds of motions
23 usually the argument is that the District Court shouldn't be
24 acting because the Bankruptcy Court is the proper place.

11:18:18 25 And we get those kind of motions fairly often in commercial

1 cases or foreclosure cases, what have you.

2 All right. So I'll just have to look at that
3 in the context of your overall -- your motions overall.

4 I think that I've addressed, other than the
11:18:42 5 motions to dismiss, and the motions to stay, and the motion
6 to transfer, I've addressed the other smaller -- I call it
7 smaller-type motions, motions having to do with time frames
8 and so forth.

9 So I think that's about all we can do today,
11:19:12 10 but it gives me an orientation, gets me started on the case,
11 and I, you know, when I receive a file like this that's been
12 around and, you know, it seems to me the best thing was to
13 get you in here and see some faces and hear some arguments
14 and get into it that way.

11:19:30 15 So this has been helpful to me, and I'll take
16 it from here.

17 Is there anything further?

18 Mr. Eisler?

19 MR. EISLER: No, Your Honor.

11:19:40 20 THE COURT: All right. And, I'm sorry, can
21 you give me your name? I've got all these names here.

22 Give me your name again.

23 MR. McMILLAN: Ron McMillan.

24 THE COURT: Okay.

11:19:54 25 MR. McMILLAN: With Calfee, Halter

1 representing Rudd and Newmarket.

2 THE COURT: Okay. Are there any additional
3 comments from any of the counsel of any of the defendants at
4 this time?

11:20:08

5 Okay. That will be all then.

6 Thank you.

7 - - - - -

8 (Proceedings concluded)

9 - - - - -

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Susan Trischan, Official Court Reporter
Certified Realtime Reporter

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