

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

In re)	Case No. 07-CV-0150
)	
LEVEL PROPANE GASES, INC., <i>et al.</i> ,)	
)	Bankruptcy Case No. 02-16172
Debtors.)	
_____)	
)	
WILLIAM H. MALOOF,)	Judge: ANN ALDRICH
)	
Appellant,)	Magistrate Judge: PERELMAN
)	
-vs-)	
)	
LEVEL PROPANE GASES, INC., <i>et al.</i> ,)	
)	
Appellees.)	

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

APPELLEES' BRIEF

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I. INTRODUCTION

The specific issue before this Court is whether the Bankruptcy Court below abused its discretion in determining that sanctions should be imposed under 28 U.S.C. § 1927 and/or its inherent powers where counsel to William H. Maloof (“Mr. Maloof” or “Appellant”) (a) filed a renewed and restated motion that (i) was duplicative of a virtually identical motion that had been denied by the Bankruptcy Court less than two weeks previously and (ii) lacked a proper legal foundation in that it did not comply with the requirements of Rules 59 and 60(b) of the Federal Rules of Civil Procedure; (b) falsely alleged that the renewed motion was premised on newly discovered evidence; (c) thereafter commenced an orchestrated campaign of provocatively captioned supplemental filings each purporting to present new evidence to the Bankruptcy Court; (d) acknowledged on the record that due diligence had not been completed prior to the filing of such pleadings; (e) filed a post-hearing brief recapitulating Appellant’s argument notwithstanding the fact that no such brief had been requested by the Bankruptcy Court; and (f) subsequently, filed as “newly discovered” evidence, a document that had been filed with the Bankruptcy Court and had been a matter of public record for more than three years.

Level Propane Gases, Inc. (“Level”) and its affiliated debtors and debtors in possession (collectively, the “Debtors” or “Appellees”), in those certain cases under chapter 11 of Title 11 of the United States Code pending in the United States Bankruptcy Court for the Northern District of Ohio (the “Bankruptcy Court”) and being jointly administered under Case No. 02-1672, maintain that this Court should affirm the decision of the Bankruptcy Court appealed herein. In short, the Court should find that the Bankruptcy Court did not abuse its discretion in determining that Appellant had filed duplicative, untimely and unwarranted pleadings related to the appointment of an examiner, warranting the imposition of sanctions under 29 U.S.C. § 1927 and its inherent powers.

II. STATEMENT OF ISSUES ON APPEAL

Whether the Bankruptcy Court abused its discretion in determining that Appellant had filed duplicative, untimely and unwarranted pleadings relating to the appointment of an examiner, warranting the imposition of sanctions under 29 U.S.C. § 1927?

Whether the Bankruptcy Court abused its discretion when, under the rubric of its inherent powers, it imposed sanctions on Appellant for its vexatious, wanton and oppressive conduct?

III. STATEMENT OF THE CASE AND RELEVANT FACTS

The basic history of the Debtors' chapter 11 cases is undisputed. The Debtors' bankruptcy cases were commenced on June 6, 2002 (the "Petition Date") when Deutsche Bank Trust Company Americas, LaSalle Bank National Association and the Provident Bank (collectively the "Petitioning Creditors") filed involuntary petitions for relief (the "Involuntary Petitions") under chapter 7 of the Bankruptcy Code (the "Chapter 7 Cases") against each of Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level, Level Energy Group, Inc. and WHM Emprises, Inc. (collectively, the "Original Debtors"). Subsequent thereto, the Petitioning Creditors, the Original Debtors and Mr. Maloof entered into negotiations regarding the Involuntary Petitions.

On June 11, 2002, the Bankruptcy Court entered an *Agreed Final Order and Stipulation: (a) Acknowledging the Authority of Charles Sweet as Sole Director of All Debtors; (b) Converting Cases to Voluntary Cases Under Chapter 11; (c) Granting Order for Relief Under Chapter 11; (d) Ordering Joint Administration of All Cases; and (e) Granting Other Relief* (the "Agreed Order"). The Agreed Order was supplemented on June 13, 2002 to clarify that orders for relief granted pursuant to the Agreed Order were to become effective as of June 17, 2002. On June 17, 2002, the Bankruptcy Court entered its *Order Converting Cases to Cases Under*

Chapter 11 of the Bankruptcy Code, pursuant to which the Chapter 7 Cases of the Original Debtors were converted to cases under chapter 11 of the Bankruptcy Code.

Subsequent thereto, under the supervision of the Bankruptcy Court and with the active involvement of numerous parties in interest, including Mr. Maloof, the official committee of unsecured creditors appointed by the office of the United States Trustee (the “Committee”), numerous equipment financiers, the Petitioning Creditors, the Equal Justice Foundation (class counsel in a class action lawsuit brought against Level on behalf of its customers in Ohio) and various state attorney generals, the Debtors’ propane distribution business was sold as a “going concern” on July 2, 2003, and their parking lot business was sold as a going concern in January 21, 2004. Every action taken by the Debtors outside of the ordinary course of their businesses – and many actions arguably in the ordinary course of the Debtors’ business but brought before the Bankruptcy Court out of an excess of caution – were approved by the Bankruptcy Court after notice and a hearing.

The Appointment of the Examiner

On or about April 30, 2003, almost a year after the Petition Date, the Bankruptcy Court, on motion of the United States Trustee (the “UST”), ordered the appointment of an examiner in the Debtors’ chapter 11 cases. Thereafter, G. Ray Warner was appointed to serve as examiner (the “Examiner”) by the United States Trustee. Mr. Maloof had also moved for the appointment of an examiner in these cases, but the Bankruptcy Court denied his motion as moot in light of the granting of the UST’s motion. On June 6, 2003, the Examiner – after reviewing thousands of pages of documents and conducting 22 sworn and unsworn witness interviews – filed his report and related exhibits, deposition transcripts and supporting documentation with the Bankruptcy Court.

Mr. Maloof's April 2004 Request for Inquiry

On April 13, 2004, Mr. Maloof filed a *Notice of William Maloof's Sole Shareholder Request for Inquiry by the Honorable John Ashcroft, Attorney General of the United States of America, into the Alleged Misconduct by the U.S. Trustee Saul Eisen, Examiner Warner and Other Officers of the Court* (the "Request for Inquiry"), alleging therein that the Debtors had been destroyed by "the malfeasance and breach of fiduciary duties by U.S. Attorney Saul Eisen and his hand [sic] G. Ray Warner in collusion with attorneys and other officers of the court seeking to pillage the company of its assets." Mr. Maloof specifically accused:

- The Bankruptcy Court of wrongfully denying him a 2004 examination and wrongfully deferring to the desires of the Bank Group, the Bank Group's attorneys and a personal friend in deciding motions;
- Debtors' counsel, Benesch, Friedlander, Coplan & Aronoff LLP ("BFC&A"), of destroying documents based on its financial instability, engaging in a pattern of disinformation and misrepresentation and of having misappropriated federally sponsored research from Case Western; and
- BFCA, the banks, Richard Jacobs, the Examiner, Greenberg & Taurig of conspiring to "destroy a new way of delivering propane ... because its cost-effectiveness threatened the NYSE companies, the law firms and banks viabilities."

[B.R. 2994 – Sanctions Motion – p. 9-10].

The Original Motion to Reopen the Examiner's Investigation

Commencing in January 2006, Mr. Maloof filed the first of several motions seeking to re-litigate prior decisions made by the Bankruptcy Court during the course of the Debtors' chapter 11 cases, each such motion being substantially premised on modifications, elaborations or variants of the allegations made in the Request for Inquiry. The first such motion was Mr. Maloof's *Motion to Reopen the Examiner's Investigation* (the "Original Motion to Reopen"),

filed on January 31, 2006, two and a half years after the filing of the Examiner's Report.¹ Mr. Maloof thereafter followed the filing of the Original Motion to Reopen with a series of supplemental evidentiary submissions, including one filed after the deadline for such submissions set forth in the Bankruptcy Court's scheduling order. [B.R. 2974 – Memorandum of Opinion and Order – p. 3-4].

On June 27, 2006, following an evidentiary hearing thereon, the Bankruptcy Court issued an order denying the Original Motion to Reopen (the "Order Denying the Original Motion to Reopen"). After a detailed review and analysis of Mr. Maloof's evidentiary submissions, the Bankruptcy Court found that Mr. Maloof had failed to present "credible evidence (a) of a systematic campaign of document destruction or (b) that the Debtors' financial balance sheet or customer records were compromised." [*Id.*, at pp. 12, 14 and 15]. Accordingly, having determined that Mr. Maloof had not demonstrated cause for reopening the Examiner's investigation or for the appointment of a second examiner in the Debtors' cases, the Bankruptcy Court denied the Motion. [*Id.*, at p. 15]. Mr. Maloof did not appeal or seek reconsideration of the Order Denying the Original Motion to Reopen. [B.R. 3006 – Hearing Transcript – p. 20, lines 7 – 23].

The Renewed and Restated Motion to Reopen the Examiner's Investigation

On July 12, 2006, Mr. Maloof, by and through his counsel, filed the Renewed Motion with the Court. Mr. Maloof's Renewed Motion again demanded that a new "examiner be

¹ In addition to the Original Motion to Reopen and the subsequently filed *Renewed and Restated Motion to Reopen Examiner's Investigation and for Substitute Examiner* discussed below, such filings include: (a) the *Motion of William H. Maloof to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings Entered on June 11, 2002 and Motion for Leave to Controvert the Bankruptcy Petition Filed on June 6, 2002*; (b) the *Supplemental Post-Hearing Document Submission in Support of Motion of William H. Maloof to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings Entered on June 11, 1002 and Motion for Leave to Controvert the Involuntary Bankruptcy Petition Filed June 6, 2002* [B.R. 2976]; and (b) the *Motion of William H. Maloof to Disqualify Debtor's Counsel Pursuant to 11 U.S.C. § 327*, filed on November 14, 2006.

appointed. [B.R. 2981 – Renewed Motion – p. 1]. Mr. Maloof attempted to support his renewed demand by alleging that *new evidence* had just recently become available that “demonstrates conclusively *a campaign of deliberate, criminal, document destruction* and concealment of material facts with damning conduct that is specific as to the date, time, place and parties.” [Id., at ¶¶ 1-2 (Emphasis added)]. The evidence submitted with the Renewed Motion consisted of:

- Exhibits in Volume A and the Transcripts in Volume B (*filed June 6, 2003*) appended to the Examiner’s report of June 6, 2003, Docket No. 1616;
- Evidentiary Submissions filed in support of his Motion to Reopen Examiner’s Report, *filed January 31, 2006*, Docket 2889, being Docket Nos. 2914 (*filed February 28, 2006*), 2926 (*filed March 16, 2006*), 2951 (*filed March 31, 2006*) and 2952 (*filed April 3, 2006*);
- Facts set forth in the Motion to Vacate filed on or about *June 6, 2006*;
- The Affidavit of Timothy Conklin dated *April 19, 2006*;
- Appellant’s own statement dated *June 6, 2006*;
- Two e-mail exchanges, allegedly from Level’s internal e-mail system, dating from *January of 2003*;
- Statement Made Under Penalty of Perjury by Paul Dolansky dated July 10, 2006.

[B.R. 2981 – Renewed Motion – p. 2]. Thus, the only “new evidence” attached to the Renewed Motion were the e-mails from January 2003 and the Affidavit of Paul Dolansky. Mr. Dolansky, however, was not a new witness as a prior affidavit of his had been included in and was addressed by the Bankruptcy Court in its discussion of Mr. Maloof’s Third Supplemental Evidentiary Submission in support of the Original Motion to Reopen. (B.R. 2974 – Memorandum of Opinion and Order – p. 13]. Similarly, the January 2003 e-mails did not constitute “new evidence” as they had been filed with the Bankruptcy Court on June 27, 2006 as part of Appellant’s *Supplemental Post-Hearing Document Submission in Support of Motion of William H. Maloof to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11*

Proceedings Entered Into on June 11, 2002 and Motion for Leave to Controvert the Involuntary Bankruptcy Petition Filed June 6, 2002 (the “Motion to Vacate”). [B.R. 2976 – Supplemental Post-Hearing Document Submission in Support of Motion to Vacate; B.R. 2990 – Debtors’ Response to Supplemental Post-Hearing Document Submission in Support of Motion to Vacate – p. 8-10].

An Orchestrated Campaign of Supplemental Submissions

Subsequent to the filing of the Renewed Motion, Appellant commenced an orchestrated campaign of provocatively captioned supplemental filings, each purporting to present new evidence to the Bankruptcy Court:

a. The first, denominated a *Supplemental Submission in Support of the Renewed and Restated Motion of William H. Maloof to Reopen Examiner’s Investigation and for Substitute Examiner: “An Unchecked Passion for Control”* (the “First Supplemental Submission”) was filed on July 17, 2006, five days after the filing of the Renewed Motion. (the “First Supplemental Submission”). The “new evidence” attached to the First Supplemental Submission was an ***affidavit by Mr. Maloof himself concerning his memory of an interview that occurred in May of 2003***. [B.R. 2985 – First Supplemental Submission].

b. The second, denominated a *Second Supplemental Submission in Support of the Renewed and Restated Motion of William H. Maloof to Reopen Examiner’s Investigation and for Substitute Examiner: “A Passion for Control”* (the “Second Supplemental Submission”), was filed a week later, on July 24, 2006. The “new evidence” attached to the Second Supplemental Submission was:

- Motion to Compel ***filed with the Bankruptcy Court on July 29, 2003 with attachments dating back to 2001***;
- An Order of the Bankruptcy Court ***dated September 5, 2003***;
- An affidavit by Johnathan Caldwell ***dated April 12, 2006***; and
- A purported e-mail ***dated August 12, 2003*** between Steven Sues, the Debtors’ postpetition chief executive officer, and David Jesse, one of the Debtors’ attorneys.

[B.R. 2986 – Second Supplemental Submission].

c. The third, denominated a *Third Supplemental Submission in Support of the Renewed and Restated Motion of William H. Maloof to Reopen Examiner's Investigation and for Substitute Examiner: "A Passion for Control Results in an Orgy of Destruction"* (the "Third Supplemental Submission"), was filed on July 26, 2006, a mere two days later. This time the purportedly new evidence submitted included:

- A partial copy of a document request ***alleged to have been served on April 23, 2003***; and
- Two sets of e-mails allegedly from Level's internal e-mail system ***dated April of 2003*** and relating to an apparent loss of customer data with respect to transactions before April 2002.
- An article from LP Gas magazine ***dated November 1, 2003***.

[B.R. – 2987 – Third Supplemental Submission].

d. Five days later, on July 31, 2006, Mr. Maloof filed his *Fourth Supplemental Submission in Support of the Renewed and Restated Motion of William H. Maloof to Reopen Examiner's Investigation and for Substitute Examiner: "A Passion for Control: How to Hide Leased Tanks in Plain Sight"* (the "Fourth Supplemental Submission"). Attached to the Fourth Supplemental Submission was a single email allegedly from Level's internal email system ***dated April 2003*** relative to Level's customer count. [B.R. 2988 – Fourth Supplemental Submission].

e. On August 1, 2006, one day later, Mr. Maloof filed his *Fifth Supplemental Submission in Support of the Renewed and Restated Motion of William H. Maloof to Reopen Examiner's Investigation and for Substitute Examiner: "A Passion for Control and the Court's Customer List"* (the "Fifth Supplemental Submission"). The Fifth Supplemental Submission focused on the UST's ***August 2003*** response to the Debtors' motion to maintain certain confidential customer information under seal, attaching (i) an e-mail dated August 12, 2003 between Steve Sues, the Debtors' chief executive officer and Phillip Caliesen, counsel for Horizon Propane, regarding the UST's response to the motion and (ii) an affidavit ***by Mr. Maloof himself describing alleged events purportedly witnessed by Mr. Maloof in October 2002***. [B.R. 2989 – Fifth Supplemental Submission].

The Debtors' Objection to the Renewed Motion

On August 2, 2006, six days before the scheduled hearing on the Renewed Motion, the Debtors filed their objection to the Renewed Motion and Response to the Supplemental Evidentiary Submissions (the "Objection"), arguing that the Renewed Motion was either a

motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure or a motion for relief from judgment under Civil Rule 60(B)(2). With respect to Civil Rule 59(e), Debtors argued that such a motion was untimely and that Appellant had failed to present newly discovered evidence not available at the time of the hearing or evidence demonstrating a manifest error of law or fact. With respect to Civil Rule 60(B)(2), the Debtors argued that Appellant had failed to present the Bankruptcy Court with newly discovered evidence that could not, by due diligence, have been discovered in time to move for a new trial under Civil Rule 59(b).

The Objection dissected each of the supplemental evidentiary submissions that had been filed by Appellant, noting that that:

- a. The First Supplemental Submission did not constitute newly discovered evidence as a similar affidavit setting forth the same claims had been filed with the Bankruptcy Court by Appellant on April 13, 2004. (B.R. 2993 – Objection – p. 9);
- b. The Second Supplemental Submission – consisting of (a) documents that were or related to pleadings filed with the Bankruptcy Court in 2003 and (b) Paul Dolansky’s Affidavit dated April 12, 2006 – was not newly discovered evidence, but was instead nothing more than an unwarranted attempt to suggest that the Bankruptcy Court had engaged in conduct in this matter which resulted in an “unfair judicial proceeding.” (B.R. 2993 – Objection – p. 10-11).
- c. The Third Supplemental Submission, consisting primarily of old evidence – the incomplete copy of the Examiner’s document production request to the Debtors, had previously been filed with the Bankruptcy Court by Appellant in July 2003, a news story dating from November 2003 – was nothing more than another attempt by Appellant to manipulate facts and create apparent, but unsubstantiated, connections for purposes of making unfounded allegations of wrongdoing by Debtors’ postpetition management in an “orgy of destruction” resulting from “the passion for control already exhibited by the banks.” Specifically, in this instance, implying a connection between the Examiner’s discovery request on Debtors – purportedly served on the Debtors on April 21, 2003, the date on which the Examiner was appointed, and the apparent loss of certain customer data related to transactions predating March 2002, which loss was reflected in unauthenticated internal Level Propane e-mails also dated on or about April 21, 2003. (B.R. 2993 – Objection – p. 11-12).

- d. The Fourth Supplemental Submission – consisted of nothing more than a single, unauthenticated, internal Level Propane e-mail from April 2003 forwarding a “customer count as a function of past due age analysis.” (B.R. 2993 – Objection – p. 12).
- e. The Fifth Supplemental Submission – consisting of Appellant’s own affidavit with respect to events allegedly witnessed on October 15, 2002 and an unauthenticated e-mail exchange relating to the United States Trustee’s position with respect to a contested matter pending in the Bankruptcy Court in August 2003 – was not newly discovered evidence and ignored the subsequent Bankruptcy Court order directing that the subject customer records “are to remain under seal to the close or dismissal of the Debtors’ chapter 11 cases. (B.R. 2993 – Objection – p. 13).

The Debtors’ Motion for Sanctions

The Debtors also filed their motion for sanctions (the “Sanctions Motion”) on August 2, 2006, alleging therein that Mr. Maloof’s counsel should be sanctioned under 28 U.S.C. § 1927 and or the Bankruptcy Court’s inherent power in connection with the “recent barrage of unwarranted filings” – specifically, the Renewed Motion and numerous supplemental filings – that were “nothing more than an untimely and unwarranted attempt to relitigate issues that have already been decided and must be given finality.” Noting that the Renewed Motion and its numerous supplements “contain irrelevant and unsupported factual assertions that impugn the integrity of [the Bankruptcy Court], the participants in this process and these proceedings,” the Debtors asked the Bankruptcy Court to use its statutory and inherent powers to stop Appellant’s abuse of judicial resources and the waste of the Debtors’ assets. The Debtors alleged that sanctions were appropriate because:

- a. Mr. Maloof had failed to observe the requirements for filing motions under the applicable Rules of Civil Procedure, i.e., Civil Rules 59 and 60(b)(2);
- b. The Renewed Motion was not based on newly discovered evidence as represented to the Bankruptcy Court;

c. The Renewed Motion and the numerous supplements contained “numerous factual allegations that are wholly devoid of support and extrapolate to unwarranted conclusions suggesting a conspiracy and wrongdoing by each and every party to this proceeding since its inception;” and

d. Substantially the same allegations of “malfeasance and breach of fiduciary duties” had been raised in a prior filing by Mr. Maloof in April of 2004 and that the Renewed Motion and the numerous supplements were “nothing more than a collection of redundant, impertinent, immaterial and unsupported accusations that, taken in their most favorable light, do nothing more than attempt to reargue matters previously raised over two years ago.”

In light of the foregoing, the Debtors asserted that the Bankruptcy Court should find the Renewed Motion to be nonsensical, unnecessary, vexatious and deserving of sanctions. [B.R. 2994 – Motion for Sanctions].

Appellant Continues to File Additional Supplemental Filings

In the days immediately preceding the hearing on the Renewed Motion, Mr. Maloof made two more supplemental submissions to the Bankruptcy Court:

a. On August 3, 2006, five days prior to the hearing on the Renewed Motion, Mr. Maloof filed his *Sixth Supplemental Submission in Support of the Renewed and Restated Motion of William H. Maloof to Reopen Examiner’s Investigation and for Substitute Examiner: “A Passion for Control Meets its First Eyewitness”* (the “Sixth Supplemental Submission”), attaching the declaration of Suzanne Arena, a former Level employee, regarding the Debtors’ ability to access alleged missing customer data subsequent to April 21, 2003 and the closing and reopening of the hard copy customer account archive, executed on July 30, 2006. [B.R. 2995 – Sixth Supplemental Submission].

b. A day later, on August 4, 2006, Mr. Maloof filed his *Seventh Supplemental Submission In Support of the Renewed and Restated Motion to Reopen Examiner’s Investigation and For Substitute Examiner: “Hidden Customers Restored”* (the “Seventh Supplemental Submission”), attaching thereto a second declaration by Suzanne Arena, a former Level employee, her role in Debtors efforts to contact holders of customer accounts predating April 2002 and inviting them to return as Level Customers, executed August 1, 2006 [B.R. 2997- Seventh Supplemental Submission].

An Admission that Due Diligence Had Not Been Conducted Before The Filing Of The Renewed Motion

The Bankruptcy Court heard argument on the Renewed Motion and the Debtor’s Motion

for Sanctions on August 8, 2006. At the hearing, the Debtors noted that Appellant's counsel had acknowledged on the record that he had filed the Renewed Motion without performing the necessary due diligence:

He indicated to you that documents were filed as found. What we now know is that the motion for sanctions is even more grounded in that filing motions without completing the due diligence and the investigation that counsel talked about being necessary indicates that before the first motion was ever filed before this Court, that investigation should have been undertaken and gone through such that the briefing schedule by this Court could have been set and maintained without all the unnecessary filings that we've seen in repeated supplemental submissions. Those supplemental submissions, Your Honor, as you can well imagine, made briefing and preparing for this hearing by Debtors' counsel even more costly, even more cumbersome and less effective than it would have been had counsel taken the time to prior to filing the first motion to go through all the documents and conduct the analysis that he talked about. And Your Honor, that's what sanctions under the rules that we've currently asked for sanctions under is about.

[B.R. 3006 – Hearing Transcript – p. 17, line 21 to p. 18, line 15].

**Appellant Submits a Post-Hearing Brief Though None
Was Requested by the Bankruptcy Court**

Notwithstanding the fact that the Bankruptcy Court had not requested post-hearing briefs, on August 10, 2006 Mr. Maloof filed a Post-Hearing Brief, denominated a “recapitulation,” in support of the Renewed Motion. On August 14, 2006, the Debtors filed a brief response requesting that Appellant's Post-Hearing Brief be stricken as it had not been requested by the Bankruptcy Court and was wholly unnecessary as Appellant had had ample opportunity to put all relevant information before the Court prior to the hearing and to articulate the arguments and allegations asserted therein at the hearing. [B.R. 3004 – Response to Post-Hearing Brief].

Appellant continued to file supplemental materials with the Bankruptcy Court. On August 23, 2006, Appellant filed a reply to the Debtors' response to Appellant's post-hearing brief, making additional argument and attaching documents that had been in Appellant's possession and a purported e-mail from February 2003 that had allegedly been newly discovered.

Subsequently, on September 6, 2006, Appellant filed his *Eighth Supplemental Submission in Support of the Renewed and Restated Motion to Reopen Examiner's Investigation and For Substitute Examiner: "Full Circle"* (the Eighth Supplemental Submission), attaching thereto one document, an email dated January 13, 2003, from Mark Schlachet to H. Jeffrey Schwartz and William Schonberg (the "Schlachet E-Mail").

The Debtors filed a response to the Eighth Supplemental Submission, citing it as illustrative of the need and propriety of granting the Sanctions Motion. The Debtors pointed out that *the Schlachet E-Mail was attached as an Exhibit to the Examiner's Report that was filed with the Court more than three years ago*. Noting that it could be found in Exhibit A, Volume 3, Exhibit 281, filed as Docket No. 1623 on June 6, 2003. Thus, the Eighth Submission revealed that either: (a) Appellant was guilty of failing to research the basis for both the Original Motion to Reopen and the Renewed Motion or (b) Appellant and his counsel had intentionally misrepresented to the Court when documents were "discovered."

Thus, despite the efforts of Mr. Maloof's counsel to claim "that [it] came into possession of counsel over this Labor Day Weekend" – the Schlachet E-Mail has been a matter of public record for more than three years.

More importantly, the Schlachet E-Mail was part of the report of the very examination that Mr. Maloof and his counsel are arguing should be "reopened." It seems incredulous that a good faith motion to reopen the Examiner's Investigation could be made without first reviewing the Examiner's Report and the exhibits filed in connection therewith. Thus, the Eighth Submission establishes that *if* the Schlachet E-Mail was actually not discovered by Mr. Maloof and his counsel until Labor Day Weekend, then Mr. Maloof and his counsel failed to exercise the required due diligence before making allegations concerning the scope and findings of the Examiner and before filing any of the submissions to this Court including the [Original Motion to Reopen], the Renewed Motion and the seven evidentiary submissions previously filed with the Court.

Citing the resubmission of the Schlachet E-Mail "under the guise of evidence that just came into possession of Mr. Maloof's counsel" as "further evidence of a deliberate campaign of

unreasonable and vexatious litigation tactics being pursued by Mr. Maloof and his counsel, tactics designed to harass the Debtors, burden the Debtors' bankruptcy estates and impugn the integrity of this Court and of many professionals who have participated in the administration of this estate," the Debtor's again requested the imposition of sanctions by the Bankruptcy Court. [B.R. 3019 – Supplement to Sanctions Motion].

The Bankruptcy Court Grants the Sanctions Motion

On December 7, 2006, the Bankruptcy Court entered its Memorandum of Opinion and Order granting the Sanctions Motion. The Bankruptcy Court found, based on a review of the record and applicable law, that the Renewed Motion was "meritless, vexatious and has unreasonably multiplied matters pertaining to the appointment of an examiner, as required to be determined by this Court under 28 U.S.C. § 1927." [B.R. 3047 – Memorandum of Opinion and Order – p. 5]. Noting that Appellant had sought the same relief three times, unsuccessfully, the Bankruptcy Court found that "[s]uch relitigation of issues is precisely the sort of conduct proscribed by § 1927" The Bankruptcy Court further adopted "the Debtors' averments that Maloof's alleged 'newly discovered evidence' should have been discovered long ago through the exercise of due diligence." [*Id.* at p. 6]. Finding the Sanctions Motion well premised, the Bankruptcy Court imposed sanctions in the form of attorneys' fees and costs relative to the filing and defense of the Renewed Motion and the related supplemental pleadings² and enjoined Appellant from requesting an examiner to investigate matters that had been previously examined and/or been adjudicated by the Bankruptcy Court. [*Id.* at p. 7]. Appellant's notice of appeal followed.

² As directed by the Bankruptcy Court, Debtors' counsel has submitted an itemization of such fees and costs. To date, however, the Bankruptcy Court has not determined the amount of such fees and costs that are to be assessed against Appellant's counsel.

IV. STANDARD OF REVIEW

“The court reviews bankruptcy court findings of fact for clear error and conclusions of law *de novo*.”³

A bankruptcy court’s findings of fact are not set aside unless clearly erroneous. However, a “bankruptcy court’s legal conclusions, drawn from the facts so found, are reviewed *de novo*.” Absent either a mistake of law or an abuse of discretion, the bankruptcy court ruling must stand. A bankruptcy court “may abuse its discretion by ignoring a material factor that deserves significant weight, relying on an improper factor, or, even if it [considered] only the proper mix of factors, by making a serious mistake in judgment.”⁴

Sanctions decisions are reviewed under the deferential abuse of discretion standard.⁵ “An abuse of discretion occurs only when the [trial] court ‘relies upon clearly erroneous findings of fact or uses an erroneous legal standard.’”⁶ “An abuse of discretion is defined as a ‘definite and firm conviction that the [bankruptcy court] committed a clear error of judgment.’”⁷ The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court’s decision; if reasonable persons could differ as to the issues, then there is no abuse of discretion.”⁸

³ *Borock v. Mathis (In re Clipper Int’l Corp.)*, 154 F.3d 565, 567 (6th Cir. 1998) (citation omitted).

⁴ *In re Campano*, 293 B.R. 281, 283 (D.N.H. 2003) (citations omitted).

⁵ *Mapother & Mapother v. Cooper (In re Downs)*, 103 F.3d 472, 478 (6th Cir. 1996); *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997); *Runfola & Associates v. Spectrum Reporting II*, 88 F.3d 368, 375 (6th Cir. 1996).

⁶ *Downs*, 103 F.3d at 480-81.

⁷ *In re M.J. Waterman & Assocs., Inc.*, 227 F.3d 604,607-08 (6th Cir. 2000) (quoting *Soberay Mach. & Equip. Co. v. MRF Ltd.*, 181 F.3d 759, 770 (6th Cir. 1999)).

⁸ *Id.* at 608 (citations omitted).

V. ARGUMENT

A. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT APPELLANT'S REPETITIVE FILINGS RELATING TO THE APPOINTMENT OF AN EXAMINER WARRANTED THE IMPOSITION OF SANCTIONS UNDER 28 U.S.C. § 1927.

Section 1927 of the Title 28 of the United States Code provides that “[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceeds in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys’ fees reasonably incurred because of such conduct.”⁹ In *In re Ruben*, the Sixth Circuit Court of Appeals succinctly set forth the standard for sanctions under section 1927:

Section 1927 of Title 28 provides for an award of attorneys’ fees where an attorney “multiplies the proceedings in any case unreasonably and vexatiously....” As explained in the legislative history of the 1980 amendment to section 1927, the section is designed as a sanction against dilatory litigation practices and is intended to require an attorney to satisfy personally the excess costs attributed to his misconduct. See H.R.Rep. no. 1234, 96th Cong., 2d Sess. 8, reprinted in U.S.Code Cong. & Ad. News 2716, 2781, 2782. See generally Annotation, What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously so as to Warrant Imposition of Liability on Counsel Under 28 U.S.C. § 1927 for Excess Costs, Expenses, and Attorney Fees, 81 A.L.R. Fed. 36 (1987).

In *United States v. Ross*, 535 F.2d 346, 6th Cir. 1976), we initially defined “unreasonably and vexatiously” to mean “an intentional departure from proper conduct, or, at a minimum, . . . a reckless disregard of the duty owed by counsel to the court,” *Id.* at 349. We stated in *Ross* that unintended, inadvertent, and negligent acts will not support an award under section 1927, *Id.* at 349-50, even if significant costs are incurred by the court and opposing parties as a result thereof. As explained in *Colucci v. New York Times Co.*, 533 F.Supp. 1011, 1013-14 (S.D.N.Y. 1982), care must be take in assessing attorneys’ fees under section 1927 lest attorneys be deterred from their duty to “represent [a] client zealously . . .” Model Code of Professional Responsibility EC 7-1 (1980).

More recently, we have noted a relaxed standard applicable to section 1927 determinations. In *In re: Jaques*, 761 F.2d 302 (6th Cir. 1985), *cert. denied*, --- U.S. ---, 106 S.Ct. 1259, 89 L.Ed. 2d 570 (1986), the majority opinion suggested that intent is no longer relevant to such determinations, *Id.* at 306,

⁹ 28 U.S.C. § 1927.

although a majority of the panel could not agree on this rule. However, a similar concept was articulated in *Jones, supra*, as follows:

28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for “unreasonable and vexatious” multiplication of litigation ***despite the absence of any conscious impropriety***. An attorney’s ethical obligation of zealous advocacy on behalf of his or her client does not amount to *carte blanche* to burden the federal courts by pursuing claims through the use of multiplicative litigation tactics that are harassing, dilatory or otherwise “unreasonable and vexatious.” Accordingly, at least when an attorney knows or reasonably should know that a claim is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney.

789 F.2d at 1230 (emphasis added). *Jones* makes clear that the standard for section 1927 determinations in this circuit is an objective one, entirely different from determinations under the bad faith rule. See *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237, 243 (6th Cir. 1986), *cert. dismissed*, --- U.S. ---, 107 S. Ct. 2475, 96 L.Ed.2d 368 (1987).

Nevertheless, we do not read these subsequent cases as overruling the thrust of *Ross*, to wit, that simple inadvertence or negligence that frustrates the trial judge will not support a sanction under section 1927. There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.¹⁰

Relitigation of previously decided issues is precisely the sort of conduct that is proscribed by section 1927.¹¹ In *Southern Industrial Banking Corp.*, a case cited by the Bankruptcy Court below, the court determined that defense counsel’s attempts to “reopen the question of whether the Debtor’s fraud constitutes a defense in these preference actions” warranted the imposition of sanctions under section 1927.¹² The sanctions request followed the filing of a motion for new trial in a preference action after the entry of a judgment against defense counsel’s client. The

¹⁰ *In re Ruben*, 825 F.2d 977, 983-984 (6th Cir. 1987).

¹¹ *Southern Industrial Banking Corp. v. Bucher (In re Southern Industrial Banking Corp.)*, 91 B.R. 463, 465 (Bankr. E.D. Tenn. 1988); *McLaughlin v. Bradlee*, 602 F.Supp. 1412, 1417 (D.D.C. 1985) (“The imposition of sanctions is one of the few options available to a court to deter and punish people who relitigate cases hopelessly foreclosed”).

¹² *Southern Industrial Banking*, 91 B.R. at 465.

plaintiff in the preference action, the liquidating trustee, alleged that sanctions were appropriate under both Bankruptcy Rule 9011 and section 28 U.S.C. § 1927, because the motion “contained redundant, immaterial and impertinent matters and attempted to raise matters that have been previously rejected or decided by this Court. In addition, the pleading, signed by counsel, contained statements of law and fact that have no foundation.”¹³ The court found that the new trial motion contained “patent misstatements of fact and law” and attempted to reargue defenses that it had already ruled upon. Additionally, the court concluded that “neither the factual allegations nor the legal theories are well founded.”¹⁴ Noting that it had repeatedly rejected defense counsel’s efforts to reopen the question of whether the Debtor’s fraud constitutes a defense to the preference actions, the Court held that “[s]uch attempted relitigation of issues is precisely the sort of conduct proscribed by § 1927.”¹⁵ The Court concluded sanctions under section 1927 were appropriate as “[t]he present motion goes beyond ‘zealous advocacy.’ It is both multiplicative and vexatious. Many statements in it are totally nonsensical.”¹⁶ As a further justification for imposing sanctions on defense counsel, the Court stated:

It is unacceptable for the Liquidation Trust to have to expend its beneficiaries’ funds for legal fees and expenses to respond to such a frivolous motion. The Court must be especially vigilant in a case such as this with literally hundreds of adversary proceedings and the real threat posed to the estate’s assets from such multiplicative and harassing litigation tactics. The cost of responding to this Motion therefore should be borne by [defense counsel], not by the Liquidating Trustee.¹⁷

The foregoing case law clearly indicates that the Bankruptcy Court’s decision imposing sanctions on Appellant is amply supported by legal precedent. Further, the imposition of sanctions in this instance was clearly warranted by Appellant’s actions in this matter.

13 *Id.* at 464.

14 *Id.* at 465.

15 *Id.*

16 *Id.* at 466.

1. **Appellant Did Not File A Motion for Reconsideration or a Timely Notice of Appeal with Respect to the Bankruptcy Court's Judgment Denying the Original Motion to Reopen.**

On June 27, 2006, following an evidentiary hearing that afforded Appellant the opportunity to submit his evidence in support of the Original Motion to Reopen, the Bankruptcy Court entered a Memorandum of Opinion and Order and a separate judgment denying the requested relief. Appellant did not file a timely motion for reconsideration or a timely notice of appeal with respect to the Bankruptcy Court's decision. [B.R. 3006 – Hearing Transcript – p. 20, lines 7 – 23]. Consequently, the Order Denying the Original Motion to Reopen became a final, non-appealable decision.

2. **The Renewed Motion Sought Exactly the Same Relief as had been Requested in the Original Motion to Reopen Which had Been Denied by the Bankruptcy Court Less than Two Weeks Before.**

Less than two weeks after the Bankruptcy Court decision denying the Original Motion to Reopen, Appellant filed the Renewed Motion. As noted by the Bankruptcy Court, the relief sought in the Original Motion to Reopen was the reopening of “the investigation conducted by G. Ray Warner (Examiner) who was appointed by this Court on April 30, 2003. In the alternative, Maloof requests the appointment of a substitute examiner (hereinafter referred to as a “second examiner”).” [B.R. 2974 – Memorandum of Opinion and Order – p. 1]. The Renewed Motion sought the exact same relief. Both pleadings presented the exact same issue to the Bankruptcy Court: whether Appellant had shown a basis or cause to have the Examiner's investigation reopened or, in the alternative to have a second examiner appointed. [B.R. 2974 – Memorandum of Opinion and Order – p. 4; B.R. 3037 – Memorandum of Opinion and Order – p.

3]. Relitigation of issues previously decided is precisely the sort of conduct proscribed by section 1927.¹⁸

3. The Renewed Motion Did Not Comply With Applicable Procedural Rules and, Therefore, Lacked a Proper Legal Foundation.

The Renewed Motion did not specify which procedural rule gave Appellant the right to file a “renewed” and “revised” motion. Absent a timely appeal, however, a challenge to a court order or judgment on the basis of newly discovered evidence may only be made under Civil Rules 59 and 60(b)(2). Civil Rule 59 subparts (b) and (e) both mandate that a motion to alter or amend a judgment be filed within ten days of the entry of the judgment. The order denying the Motion to Reopen was entered by this Court on June 27, 2006. In accordance with Bankruptcy Rule 9006(a), the ten day period set forth in Bankruptcy Rule 9023(e) would have commenced on Wednesday, June 28, 2006, the day after the entry of the Court’s order denying the Motion to reopen, and would have ended on Friday, July 7, 2006.¹⁹ The Renewed Motion was not filed until July 11, 2006 at the earliest. Thus, the Renewed Motion would have been untimely under Civil Rule 59.

Appellant’s response to the Debtors’ Objection indicated that Appellant was seeking relief under Civil Rule 60(b)(2). [B.R. 3001 – Response to Objection – p. 2]. A party seeking relief from judgment on the basis that new evidence has been located, however, must demonstrate that the new evidence was not only newly discovered evidence, but “evidence which by due diligence could not have been discovered in time to move for a new trial under Civil Rule 59.”²⁰ Thus, to present a viable motion under Civil Rule 60(b)(2) for reconsideration based on

¹⁸ *Southern Industrial Banking Corp.*, 91 B.R. at 465; *McLaughlin*, 602 F.Supp. at 1417.

¹⁹ Although the Bankruptcy Court’s order is dated June 26, 2006, the date on which the order is entered begins the time period for motion and appeals not the date when the order is handed down. *See Roque-Rodriguez v. Moya*, 926 F.2d 103, 106 (1st Cir. 1991).

²⁰ FED.R.CIV.P. 60(b)(2).

the discovery of new evidence, Mr. Maloof would have needed to establish that all of the “new evidence” brought to the attention of the Court could not have been discovered using due diligence prior to July 7, 2006. As set forth below, Appellant did not satisfy this requirement.

4. The Renewed Motion Was Not Premised on Newly Discovered Evidence or Evidence Which By Due Diligence Could Not Have Been Discovered In Time To Move For A New Trial Under Civil Rule 59.

A simple review of the evidence incorporated into and submitted with the Renewed Motion indicates that Appellant’s counsel knew or should have known that all of the evidence contained in the Renewed Motion had actually been discovered long before both the Court’s June 27th ruling and the July 7, 2006 deadline for moving for a new trial under Civil Rule 59(b).

The evidence submitted with the Renewed Motion consisted of:

- Exhibits in Volume A and the Transcripts in Volume B (*filed June 6, 2003*) appended to the Examiner’s report of June 6, 2003, Docket No. 1616;
- Evidentiary Submissions filed in support of his Motion to Reopen Examiner’s Report, *filed January 31, 2006*, Docket 2889, being Docket Nos. 2914 (*filed February 28, 2006*) , 2926 (*filed March 16, 2006*) , 2951 (*filed March 31, 2006*) and 2952 (*filed April 3, 2006*);
- Facts set forth in the Motion to Vacate filed on or about *June 6, 2006*;
- The Affidavit of Timothy Conklin dated *April 19, 2006*;
- Appellant’s own statement dated *June 6, 2006*;
- Two e-mail exchanges, allegedly from Level’s internal e-mail system, dating from *January of 2003*;
- Statement Made Under Penalty of Perjury by Paul Dolansky dated July 10, 2006.

[B.R. 2981 – Renewed Motion – p. 2].

Thus, with the exception of the two e-mail exchanges from January 2003 and the Affidavit of Paul Dolansky dated July 10, 2006, all of the evidence submitted with the Renewed Motion was demonstrably available prior to July 7, 2006, the deadline for moving for a new trial

under Civil Rule 59(b). Mr. Dolansky, however, was not a new witness as a prior affidavit of his had been included in and was addressed by the Bankruptcy Court in its discussion of Mr. Maloof's Third Supplemental Evidentiary Submission in support of the Original Motion to Reopen. (B.R. 2974 – Memorandum of Opinion and Order – p. 13]. His testimony could, therefore, clearly have been discovered with due diligence prior to the deadline for moving for a new trial under Civil Rule 59(b).

The two e-mail exchanges from January 2003 attached as “additional evidence” were similarly available before the deadline set forth in Civil Rule 59(b). Both had been filed with the Bankruptcy Court on June 27, 2006 as part of Appellant's *Supplemental Post-Hearing Document Submission in Support of Motion of William H. Maloof to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings Entered Into on June 11, 2002 and Motion for Leave to Controvert the Involuntary Bankruptcy Petition Filed June 6, 2002* (the “Motion to Vacate”). [B.R. 2976 – Supplemental Post-Hearing Document Submission in Support of Motion to Vacate; B.R. 2990 – Debtors' Response to Supplemental Post-Hearing Document Submission in Support of Motion to Vacate – p. 8-10]. Further, the alleged “obliteration of an essential library of customer account records” allegedly established by the e-mail exchange between Richard Anter, Natasha Brandt and Jamez Blair, had been discussed before the Bankruptcy Court on June 27, 2006:

You notice that counsel in none of his briefing or here today attempts to explain when it is that the new evidence was purportedly discovered. However, the last time that I had the opportunity to appear before this Court and the very day of the ruling by - - on [the Original Motion to Reopen], counsel for Mr. Maloof referenced e-mails and he referenced issues related to the destruction of the envelopes that we hear about. Consequently, the e-mails, while we have no explanation before this Court of when the new evidence, which could only be the e-mails, was located, it had to have been discovered in time to make a motion under Rule 59 because it was discovered and discussed the last time we were before the Court.

[B.R. 3006 – Hearing Transcript – p. 10, lines 6 – 20].

Clearly, when filing the Renewed Motion on July 11, 2006, Appellant’s counsel knew that there was no legitimate basis justifying the filing of the Renewed Motion at that time unless they characterized such evidence as “newly” discovered. Thus, like the other patent misstatements of law and fact contained in the Renewed Motion, the eight supplemental submissions, the post hearing brief, and other filings related to the Renewed Motion, the representation that the evidence presented in the Renewed Motion was “newly discovered” was completely inaccurate, warranting the imposition of sanctions.

5. **Appellant’s Orchestrated and Repetitive Submission of Supplemental Evidentiary Submissions – A Deliberate Multiplicative and Vexatious Litigation Tactic That Obstructed The Litigation of the Renewed Motion and Caused Additional Expense to the Debtors’ Estates – Warranted the Imposition of Sanctions.**

The Bankruptcy Court record demonstrates not only that Appellant failed to conduct appropriate due diligence before filing both the Original Motion to Reopen and the Renewed Motion, it also demonstrates that Appellant engaged in a deliberate campaign of supplemental evidentiary filings that obstructed the litigation of the Renewed Motion and caused additional expense to the Debtors’ estates.

The Bankruptcy Court heard argument on the Renewed Motion and the Debtor’s Motion for Sanctions on August 8, 2006. At the hearing, the Debtors noted that Appellant’s counsel had acknowledged on the record that the Original Motion to Reopen and the Renewed Motion had been filed without performing the necessary due diligence:

He indicated to you that documents were filed as found. What we now know is that the motion for sanctions is even more grounded in that filing motions without completing the due diligence and the investigation that counsel talked about being necessary indicates that before the first motion was ever filed before this Court, that investigation should have been undertaken and gone through such that the briefing schedule by this Court could have been set and maintained

without all the unnecessary filings that we've seen in repeated supplemental submissions.

[B.R. 3006 – Hearing Transcript – p. 17, lines 21 to p. 18, line 6].

Additionally, the submission of these supplemental evidentiary submissions – eight in number – was clearly orchestrated by Appellant's counsel. Each supplemental submission was provocatively captioned. All of the captions were thematically connected. No other reason but an intentional design explains the separate submission of the two affidavits of Suzanne Arena – dated July 30, 2006 and August 1, 2006 respectively [B.R. 2995 – Sixth Supplemental Submission; B.R. 2997 – Seventh Supplemental Submission] – when both could have been included in Appellant's Sixth Supplemental Submission filed with the Bankruptcy Court on August 3, 2006. [B.R. 2995 – Sixth Supplemental Submission]. Such multiplicative and vexatious litigation tactics warrant the imposition of sanctions under section 1927.²¹

Further, almost all of the evidence submitted had been or, with due diligence, should have been, available prior to the deadline for seeking a new trial under Civil Rule 59(b). The First Supplemental submission, for example, consisted of an affidavit by Mr. Maloof himself concerning his memory of an interview that occurred in May of 2003 and reiterating charges that had been made in connection with the Request for Inquiry filed in April 2004. [B.R. 2985 – First Supplemental Submission]. The Second Supplemental Submission consisted primarily of a motion to compel filed with Bankruptcy Court on July 29, 2003 with attachments dating back to 2001, an Order of the Bankruptcy Court dated September 5, 2003, and an affidavit by Johnathan Caldwell dated April 12, 2006. [B.R. 2986 – Second Supplemental Submission]. The Third Supplemental Submission included a partial copy of a document request alleged to have been served on April 23, 2003 (previously filed with the Bankruptcy Court by Appellant in July 2003

²¹ *Southern Industrial Banking Corp.*, 91 B.R. at 464.

as an attachment to the Motion to Compel included in the Second Supplemental Submission) and an article from LP Gas Magazine dated November 1, 2003. [B.R. – 2987 – Third Supplemental Submission]. The Fifth Supplemental Submission focused on the UST’s August 2003 response to the Debtors’ motion to maintain certain confidential customer information under seal, attaching an affidavit by Mr. Maloof himself describing alleged events purportedly witnessed by Mr. Maloof in October 2002. [B.R. 2989 – Fifth Supplemental Submission]. The Eighth Supplemental Submission consisted of an e-mail that had been attached as an Exhibit to the Examiner’s Report that had been filed (Exhibit A, Volume 3, Exhibit 281, filed as Docket No. 1623) with the Bankruptcy Court on June 6, 2003. Scattered throughout the supplemental submissions were several purported e-mails, all dating from 2003 and all allegedly from Level’s internal e-mail system. Appellant offered nothing to authenticate any of these purported e-mails, did not specify how or where they had been obtained or indicate why, with due diligence, they could not have been obtained prior to July 7, 2006, the Civil Rule 59(b) deadline.

Appellant’s orchestrated submission of the supplemental submissions obstructed litigation in this contested matter by creating confusion and making it more time consuming and costly for the Debtors to respond to the Renewed Motion. As noted by counsel for the Debtors at the hearing on the Renewed Motion:

The way that Mr. Maloof filed the documents in this case, we have a series of submissions. And unfortunately, that series of submissions creates confusion because had Mr. Maloof filed this as a complete package and attached the affidavit of Suzanne Arena to this, what we would have seen is that the allegations made early in the submissions about the library being completely destroyed are not true. What Suzanne says is that the hard copy library was not completely destroyed. That there – when it was opened back up and given access and when she saw again sat it, the fact of the matter is, is that it contained the past year’s customer information. In other words it would have contained an entire heating cycle of current customers. . . .

[B.R. 3006 – Hearing Transcript – p. 12, line 15 to p. 14, line 4]. Further, as noted by

Debtor's counsel, the staggered filing of the supplemental submissions made it more difficult and costly for the Debtors to respond to the Renewed Motion:

Those supplemental submissions, Your Honor, as you can well imagine, made briefing and preparing for this hearing by Debtors' counsel even more costly, even more cumbersome and less effective than it would have been had counsel taken the time to prior to filing the first motion to go through all the documents and conduct the analysis that he talked about. And Your Honor, that's what sanctions under the rules the we've currently asked for sanctions under is about.

[B.R. 3006 – Hearing Transcript – p. 18, lines 6-15]. Additional costs were also incurred by the Debtors in responding to Appellant's unsolicited post-hearing brief and Eighth Supplemental Submission.

Finally, imposing monetary sanctions for such frivolous and deliberate conduct is appropriate in this instance since such costs would otherwise be borne by the Debtors' bankruptcy estates. As noted by the *Southern Industrial Banking* court:

It is unacceptable for the Liquidation Trust to have to expend its beneficiaries' funds for legal fees and expenses to respond to such a frivolous motion. The Court must be especially vigilant in a case such as this with literally hundreds of adversary proceedings and the real threat posed to the estate's assets from such multiplicative and harassing litigation tactics. The cost of responding to this Motion therefore should be borne by [defense counsel], not by the Liquidating Trustee.²²

This reasoning is equally applicable here. Absent the sanctions imposed by the Bankruptcy Court, the costs of relitigating the June 27, 2006 determination that Appellant had failed to demonstrate cause for reopening the Examiner's investigation or for the appointment of a second examiner would be borne by the beneficiaries of the Debtors' estates, i.e., the Debtors' creditors. Thus, the record below demonstrates that the Bankruptcy Court did not abuse its discretion in imposing sanctions on Appellant's counsel under 28 U.S.C. § 1927.

²² *Id.*

B. A BANKRUPTCY COURT MAY UTILIZE ITS INHERENT POWERS TO SANCTION A PARTY’S ABUSE OF THE JUDICIAL PROCESS BY ENGAGING IN CONDUCT THAT IS VEXATIOUS, WANTON OR OPPRESSIVE.

The Bankruptcy Court also premised the imposition of sanctions in this matter on an exercise of its inherent powers. Section 105(a) of the Bankruptcy Code gives courts the authority to “issue any order, process, or judgment that is necessary to carry out the provisions of this title.”²³ This provision gives bankruptcy courts the broad power to implement the provisions of the Bankruptcy Code and to prevent an abuse of the bankruptcy process.²⁴

The Supreme Court, in considering the power of the federal courts to control parties practicing before them, has held that federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them.²⁵ This inherent power includes the authority to impose sanctions, including attorneys’ fees, against the attorneys’ who appear before them.²⁶ Although the Supreme Court warned that “because of their very potency, inherent powers must be exercised with restraint and discretion,” it unambiguously held that “ a court may assess attorney’s fees when a party has ‘acted in bad faith, vexatiously, wantonly or for oppressive reasons.’”²⁷

Accordingly, consistent with the plain and unambiguous language of the Supreme Court in *Chambers*, a bankruptcy court’s invocation of its inherent power to sanction a party or its counsel requires a finding that such party or counsel “acted in bad faith, vexatiously, wantonly or

²³ 11 U.S.C. § 105(a).

²⁴ *In re Clark*, 223 F.3d 859, 864 (8th Cir. 2000); *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 1997); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996); *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.)*, 40 F.3d 1084, 1089 (10th Cir. 1994); *Knowles Bldg. Co. v. Zinni (In re Zinni)*, 261 B.R. 196, 203 (6th Cir. BAP 2001). *See also, Downs*, 103 F.3d at 477 (bankruptcy courts enjoy inherent power to sanction parties for improper conduct).

²⁵ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991).

²⁶ *Id.* at 45-46.

²⁷ *Id.* at 44-46 (citations omitted).

for oppressive reasons.”²⁸ In this instance, the Bankruptcy Court specifically found that Appellant’s “repetitive filings relating to the appointment of an examiner indicate that he has indeed sought the appointment of an examiner vexatiously, wantonly and for oppressive reasons.” [B.R. 3047 – Memorandum of Opinion and Order – p. 6]. Additionally, were a finding of bad faith also required, the record below established bad faith in this instance. Bad faith, for purposes of section 105, is characterized as an attempt to abuse the judicial process.²⁹ In determining bad faith, a court is required to determine if that party has misrepresented facts in its submissions to the Court.³⁰ Here, as detailed above, Appellant falsely premised the Renewed Motion as based upon the “newly discovered” evidence. Thus, the record of in this matter, including Appellant’s representations with respect to the Renewed Motion and, among other things, the deliberate and orchestrated conduct with respect to the filing of the eight supplemental submissions and the unsolicited post-hearing brief amply demonstrates that the Bankruptcy Court did not abuse its discretion in utilizing its inherent powers in imposing sanctions.

²⁸ *Id.*; *In Re Nowatzke*, 318 B.R. 400 (E.D. Mich. 2004); *In re Bauman*, 201 B.R. 202, 203 (Bankr. W.D. Tenn. 1996) (court has inherent power to award sanctions for conduct that unreasonably and vexatiously multiplied proceedings).

²⁹ *In re Asbridge*, 61 B.R. 97, 102 (Bankr. D.N.D. 1986).

³⁰ *In re Johnson*, 708 F.2d 865, 868 (2d Cir. 1983).

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the Bankruptcy Court's Order of December 7, 2006 imposing sanctions on Appellant and his counsel.

Dated: Cleveland, Ohio
March 5, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2007, the foregoing Appellees' Brief 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/ Michael D. Zaverton