

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

In Re:	)	Case No. 07-CV-0103
	)	
LEVEL PROPANE GASES, INC., et. al.	)	
	)	Bankruptcy Case No. 02-16172
Debtors.	)	
_____	)	
	)	JUDGE ANN ALDRICH
WILLIAM H. MALOOF,	)	
	)	
Appellant,	)	MAGISTRATE JUDGE PERELMAN
	)	
	)	
vs.	)	
	)	
LEVEL PROPANE GASES, et. al.	)	
	)	
Appellees	)	

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

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**APPELLANT'S REPLY BRIEF**

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## STATEMENT OF THE CASE

The case is as set forth in Appellant's Brief in chief.

## STATEMENT OF THE ISSUES

1.) Whether the Bankruptcy Court erred the application of the law of the case doctrine in this case when it failed to articulate any previous rule stated in the litigation which it applied to the evidence presented in furtherance of the Motion denied by the Order from which this appeal is taken.

2.) Whether the Bankruptcy Court erred when it failed to consider in any manner whatsoever the evidence presented in furtherance of the Renewed Motion

## LAW AND ARGUMENT

### (1)

#### **THE BANKRUPTCY COURT ERRED IN THE APPLICATION OF THE LAW OF THE CASE DOCTRINE IN THIS CASE WHEN IT FAILED TO ARTICULATE ANY PREVIOUS RULE STATED IN THE LITIGATION WHICH IT APPLIED TO THE EVIDENCE PRESENTED IN FURTHERANCE OF THE MOTION DENIED BY THE ORDER FROM WHICH THE APPEAL IS TAKEN.**

The law of the case doctrine supports the consistency of rulings within a particular proceeding by requiring that when a ruling is revisited, that its result not change except in the event of one of three substantial changes in circumstance, first of which is "subsequent presentation of substantially different evidence," see *Craft v. United States* 233 F.2d 358 at 364 (6<sup>th</sup> Cir., 2000), citing *Hanover Insurance Co. v. American Engineering Co.* 105 F.3d 306, 312, (6<sup>th</sup> Cir., 1997). Both the Appellant and the Appellee agree as to this principle. It is as to what, exactly, the law of the case was in this case, and whether the Appellant had been presented substantially different evidence in his renewed Motion. The Appellant maintains that the law of the case, in this case,

was for an examiner's investigation to be reopened the moving party must "provide credible evidence (a) of a systematic campaign of document destruction or (b) that the Debtors' financial balance sheet or customer records were compromised," Order of June 27, 2006 at 15. The Appellee fails to address this at all in its Brief, instead it attempts to spin the law articulated in *Coal Resources, Inc. v. Gulf & Western, Inc.*, 865 F.2d 761 (6<sup>th</sup> Cir. 1989), *Craft v. United States*, *supra*, *Hanover Insurance Co.*, *supra*, and *In Re Kenneth Allen Knight Trust* 303 F3d 671, 676-677 (6<sup>th</sup> Cir, 2002) so as to leave the impression that cases on review are somehow held to a more rigorous standard than matters decided at separate points in litigation in the same trial court. The trigger for a different result in both cases is the same: "substantially different evidence."

(2)  
**THE BANKRUPTCY COURT ERRED WHEN IT FAILED TO CONSIDER IN ANY MANNER WHATSOEVER THE ADDITIONAL EVIDENCE PRESENTED WITH THE RENEWED MOTION.**

The Appellant's argument is that, first, the bankruptcy court failed to articulate what the law of this case was, which, as even the case upon which the Appellee relies, *In Re: Kenneth Knight Trust*, *supra*, requires as a predicate a statement of the law of the case. Second, failing to articulate the law of this case, the bankruptcy court failed to set out in any manner whatsoever what respects the Appellant's presentation in his Renewed Motion was not that of "substantially different evidence." Appellee's elaborate speculations as to what the Court might have meant will not cure this lacuna.

Instead, the Bankruptcy Court dismissed all of the Appellant's submissions by stating simply that Appellant "provides no meaningful new evidence to support his claims," Opinion at 6. That the Appellant found that the customer account reconciliation

library had been taken off-site and was being furtively administered off-site and that the customer data base had been compromised so that fully half of the Level Propane customers were hidden, can hardly be called meaningless. That the Appellant was not even aware of the existence of Suzanne Arena until the end of July 21, 2006, and promptly moved to obtain her statements, submitted on August 3, 2006 and August 4, 2006 (Docket Nos. 2995, 2997) her statements can hardly be characterized as anything but new evidence.

That the Appellee claims that the emails are unauthenticated does not vitiate their content, nor negate their existence. Mr. Sues and Mr. Marwil's exchange (Exhibit "A" of Docket No. 2981) does not vanish because the Appellee claims the emails are unauthenticated, nor does Mr. Anter's determination to rid the going concern of its sole comprehensive hard-copy customer records vanish because the Appellee claims the exchange between Mr. Anter and Attorney Brandt (Exhibit "B" of Docket No. 2981) was unauthenticated.

That the Appellee repeatedly insists that the bank group cannot be connected to any of the conduct of the debtors' officers is transparently incorrect: Charles Sweet was elected as sole director of Level Propane by the Bank Group, he hired the management, he entered in the agreement with Eagle Rock and all of these managers reported to him. He reported to the Bank Group. As director, he set policy that the managers executed. The managers would not go on their own frolic. Instead, as managers, they executing the will of Charles Sweet, who represented the interests of the Bank Group. The conduct of the Debtor's officers is that of the Bank Group. The Sues-Marwil exchange (Exhibit "A" Docket No. 2981) is a manifest instance of this connection and control. There can be no

clearer indication of that control than when Mr. Marwil asked Mr. Sues to assure him that:

“This new file would be held in confidence so that the lessors *cannot know the addresses and customers of their tanks, correct?*” (emphasis supplied.)

Mr. Marwil was and is counsel for Deutsche Bank, the lead lender of the Bank Group. The connection and control of the Bank Group is further borne out by its recruitment of Eagle Rock Propane as the manager of the Debtor, after the sabotage and cancellation of the September 23, 2002 auction, and the swift subsequent asset sale to that very entity who sold it to Amerigas within a matter of weeks. It was between the time of the sabotaged auction and the sale to Eagle Rock that the campaign to conceal the customers and steal the customer tanks was completed.

The evidence presented with the Renewed Motion addressed the campaign to conceal the customer accounts and the customer tanks. While the Appellee insists on dissection of each piece of evidence while complaining that the evidence was presented as an “orchestrated campaign of supplemental submissions” (Appellee’s Brief at 5) that could not be viewed as a whole. As the Appellant has previously noted, both on appeal and in the Bankruptcy Court, the evidence was submitted *as it was discovered*.

That the Appellant’s evidence was submitted *as it was discovered* is manifest from the sequence in which it came onto the docket. Had the Appellant the choice, he certainly would present first the testimony of the Arena affidavits and follow that testimony with documentary corroboration. Had Appellant the choice, he would put evidence on the record that demonstrated malicious, deliberate and purposeful conduct, the concealed operation of the library off-premises, in order to support his motion for an examiner, rather than evidence on the record that suggested reckless conduct, the

destruction of the library. However, the corroborative documents became available before the testimony. That the Appellee chose not cross-examine Ms. Arena cannot be visited upon the Appellant.

Viewed as a whole, the impact of the evidence is nothing short of damning. The Sixth and Seventh Supplemental Submissions (Docket Nos. 2995 and 2997) were the affidavits of Suzanne Arena. She came into the employment of Level Propane after Appellant had been physically banned from the premises, Arena affidavit paragraph 1 (Docket No, 2995). He never met her before July 21, 2006, paragraph 14 at *id.* Her affidavits were submitted August 3, 2006 and August 4, 2006, Docket Nos. 2995 and 2997. Her account of the off-premises concealment and furtive maintenance of the customer account reconciliation library could not have been discovered before July 21, 2006, since before that date she and the Appellant had never met, nor had the Appellant been in a position to know of her existence prior to that date, see the Statements of Jones (Docket No. 3083) and Robson (Docket No. 3082), attached. Her testimony makes conclusive the evidence previously submitted that showed that customer database had been utterly compromised and the customer account reconciliation library had been concealed and operated off-premises.

While the Appellee claims that the Arena affidavit, the Sixth Supplemental Submission (Docket No. 2995), contradicts the Anter-Brandt email sequence (Exhibit “B” to the Renewed Motion, Docket No. 2981), it actually is all the more damning. While the Anter-Brandt sequence suggests conduct, destruction of the customer account reconciliation library, that was utterly reckless, the Arena affidavit demonstrates conduct,

the concealed operation of the very same library off-premises, that was malicious, deliberate and purposeful.

The concealment of customer data and customer tank data, both in hard copy, the customer account reconciliation library, (the Anter-Brandt email sequence, Exhibit “B” Docket No. 2981, and the Arena affidavit, Docket No. 2995) and by means of the compromise of the customer database (the Sues-Marwil email sequence, Exhibit “A” of 2981, and Docket Nos. 2987, 2988, 2997) was concealment for specific purposes: (1) to frustrate the equipment lessors in locating the customer tanks, as suggested by the Sues-Marwil email sequence and (2) to conceal any means by which the true number of customers could be tested in a due diligence investigation, thereby giving these officers of the Debtors a clear field in which to misrepresent the customer count by manipulating the customer database (Docket No. 2988).

The manipulation of the customer count set the customer count below the number of customer tanks. *So doing, the officers stripped the Debtor of both its apparent going-concern value and its apparent asset value.* By setting the customer count below the tank count, it would be impossible to physically locate the customer tanks, since the purged accounts (Docket No. 2987) could not be matched to customer tank numbers, see Arena affidavit, Seventh Supplemental Submission (Docket No. 2997). Further, the purged accounts would dramatically reduce the apparent going-concern value of the Debtor, thereby facilitating the purchase of the going-concern assets for a fraction of their value out of the Bankruptcy Estate, see the second Arena affidavit, Docket No. 2997.

The Appellee in its brief at page 18 quoted the Opinion subject of this appeal to state: “Maloof provides no meaningful new evidence to support his claims here.” Read

within the context of the entire passage cited, it is clear that the Opinion has utterly failed to consider this evidence here adduced, since it goes on to say that the Appellant has made “bare allegations that Debtor’s management disposed of or destroyed largely unspecified business and financial records of the Debtors,” Appellee’s brief at 18. That the customer account reconciliation library amounted to many tens of thousands of documents stretching back over a decade’s time hardly makes this large mass of documentation “largely unspecified.” To the contrary, Appellant was quite specific in his identification of these records, and demonstrated their off-site concealment with sworn statements and documentary corroboration. That the customer database contained tens of thousands of customers in like manner hardly makes for a “largely unspecified” record. Again, quite to the contrary, Appellant was quite specific: every customer whose last transaction with the Debtor was prior to April, 2002 was purged from the database, because it was possible, not because it was prudent, or even reasonable. Appellant even provided a clear purpose for this egregious behavior: to conceal both the customers that could be concealed and to conceal the customer tanks. The actual record is at such variance with the Opinion’s characterization of that record that the Opinion might as well be addressing another record entirely.

### **CONCLUSION**

In conclusion, the Appellant took the evidence in hand to court as he discovered it. A review of the record, a record that discloses the imperfect sequence of presentation, in which corroboration of witness statements are presented before the statements, makes that very clear. The record on appeal also makes clear that the officers of the Debtors

took their action under the aegis of the Bank Group, and under the Bank Group's direction. Finally, the record makes clear that the purposeful course of conduct achieved the concealment of the hard-copy customer records of the going concern and the utter compromise of the customer database, all with the purpose to strip the Debtor of its going concern value, by concealing the customers, and to strip the Debtor of its assets, the customer accounts and customer tanks. That the Opinion sweeps aside this evidence with a parenthetical observation that the present motion "relies on substantially the same evidence" is simply astounding. For all of the foregoing reasons, the Order of the Bankruptcy Court here appealed must be reversed.

Respectfully Submitted,

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**SERVICE**

I hereby certify that on this 12th day of February 2007, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/David C. Eisler

David C. Eisler, Counsel for the Appellant