

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO**

In re:)	Chapter 11
)	
LEVEL PROPANE GASES, INC., <i>et al.</i>)	Case No. 02-16172
)	Jointly Administered
Debtors.)	
)	Randolph Baxter
)	
)	Adversary Proceeding No. 09-01127
)	
WILLIAM H. MALOOF,)	
)	
Plaintiff,)	
)	
v.)	
)	
MARK UHRICH, PLAN ADMINSTRATOR,)	
)	
Defendant.)	
)	

**DEFENDANT’S MOTION TO DISMISS AMENDED
COMPLAINT OF PLAINTIFF WILLIAM H. MALOOF**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012, defendant Mark Uhrich, the Plan Administrator for the Consolidated Estate of Level Propane Gases, Inc., and its affiliated debtors and former debtors in possession in the above-captioned chapter 11 cases, through his undersigned counsel, hereby respectfully moves this Court for entry of an order dismissing the Amended Complaint of plaintiff William H. Maloof (the “Complaint”). As set forth in greater detail in the memorandum in support, filed in conjunction herewith and incorporated herein by reference, the Complaint should be dismissed for failure to state a claim upon which relief may be granted.

Dated: May 18, 2009

Respectfully submitted,

/s/ Mark A. Phillips

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2009, a copy of the foregoing Defendant's Motion to Dismiss Complaint of Plaintiff William H. Maloof with Memorandum In Support was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Mark A. Phillips _____
One of the Attorneys for Mark Uhrich, Plan
Administrator of the Consolidated Liquidating
Estate of Level Propane Gases, Inc., et al.

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**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS
AMENDED COMPLAINT OF PLAINTIFF WILLIAM H. MALOOF**

I. INTRODUCTION

Plaintiff William H. Maloof (“Malooof”) filed his Complaint to Revoke Confirmation of Plan of Liquidation of Level Propane Gases, Inc., et al. and for Other Relief (the “Original Complaint”) with this Court on April 2, 2009. Maloof filed and served an Amended Complaint on May 7, 2009 (the “Complaint”).¹ Maloof requests that the Court revoke confirmation of the joint liquidating plan of Level Propane Gases, Inc., and its affiliated debtors and former debtors

¹ Maloof also filed a Motion for Leave to File Second Amended Complaint on May 7, 2009 (the “Motion to Amend”). The Plan Administrator contends that the considerations requiring dismissal of the Complaint apply with equal force to the proposed Second Amended Complaint and require either denial of the Motion to Amend on the grounds of futility or, in the event the Motion is granted, dismissal of that amended pleading.

in possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases. Maloof also asks the Court to “enjoin enforcement” of certain of its orders. As demonstrated below, the Complaint fails to state a claim upon which relief may be granted and defendant Mark Uhrich, the Plan Administrator of the Consolidated Estate of the Debtors (the “Plan Administrator”), therefore respectfully requests that the Court dismiss the Complaint.

II. THE PROCEDURAL HISTORY OF THE DEBTORS’ CASES

A. THE INITIATION OF BANKRUPTCY PROCEEDINGS, THE APPOINTMENT OF THE EXAMINER, AND THE SALE OF DEBTORS’ BUSINESS.

Various creditors of the Debtors commenced an involuntary bankruptcy proceeding under chapter 7 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Northern District of Ohio (the “Court”) on June 6, 2002. (B.R. 1: Involuntary Petition).² Pursuant to the agreement and stipulation of the relevant parties, the case was subsequently converted to one under chapter 11 and the cases were thereafter jointly administered under Case No. 02-1672. (B.R. 5: Agreed Final Order); (B.R. 17: Order Converting Cases).

On or about April 14, 2003, the Court, on the motion of the United States Trustee (B.R. 1107: Motion to Appoint Examiner), ordered the appointment of an examiner in the Debtors’ chapter 11 cases to address allegations that Debtors’ counsel had misled the court and had failed to provide objective advice to the Debtors. (B.R. 1281: Order). Thereafter, G. Ray Warner was appointed to serve as examiner (the “Examiner”) (B.R. 1312: Order Approving Selection of Examiner). 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,

² The abbreviation “B.R.” refers to the Bankruptcy Court’s docket entry numbers.

deposition transcripts, and supporting documentation with the Court. (B.R. 1616-18, 1620-26, 1628-30, & 1632-34: Examiner's Report and Exhibits thereto). The Examiner concluded, *inter alia*, that the evidence failed to support the allegations that had prompted his appointment.

The Examiner investigated allegations that [BFC&A] was taking direction from the [Bank Group] and/or their counsel. . . . Based upon the documents reviewed and the witness interviews, the Examiner found no evidence that [BFC&A] was controlled by the [Bank Group] and/or their counsel. Indeed, in most respects, it is the Examiner's conclusion that [BFC&A] competently represented the interests of the Debtors in these cases. . . . The Examiner found no evidence that [BFC&A] engaged in improper communications with the [Bank Group] or their counsel prior to the filing of the involuntary chapter 7 cases or that [BFC&A] had an arrangement, an advance understanding, or a unilateral design to advance the interests of the [Bank Group] at the expense of their then clients, the prepetition Debtors.

(*Id.*, Examiner's Report at 3-4). *See also William Maloof v. Level Propane Gases, Inc.*, No. 1:07cv0153, slip op. at 3, 8 (N.D. Ohio Aug. 16, 2007) (“[T]he Examiner filed a report finding that there was no evidence that [Debtors' counsel] had committed any wrongdoing. * * * The Examiner found that [Debtors' counsel] had acted in good faith, competently, and honestly.”).

On June 27, 2003, following a court-approved marketing and sales procedure, the Court entered an order on the Debtors' motion approving the sale of the Debtors' propane distribution business as a “going concern.” (B.R. 1721: Order Approving Sale (the “Level Sale Order”)). Eaglerock Propane LLP (“Eaglerock”) purchased these assets. The Court found that the consideration to be paid by Eaglerock was “fair and reasonable”, that the asset purchase agreement had been negotiated “at arm's length, without collusion and in good faith”, and that the Debtors and Eaglerock were “entitled to the protections of section 363(m) of the Bankruptcy Code.” (*Id.* at ¶¶ Q-R). On December 11, 2003, the Court entered an order approving the sale of the Debtors' parking lot as a going concern (B.R. 2161: Order Approving Sale (the “Park Place Sale Order”)). Both the Level Sale Order and the Park Place Sale Order were appealed by

Malooof to the United States District Court for the Northern District of Ohio (the “District Court”), which affirmed the orders. *William Malooof v. Level Propane Gases, Inc.*, Nos. 1:03CV2038, 2044, 2106 & 1:04CV0092 & 0307, slip op. (N.D. Ohio March 24, 2006).

B. THE MALOOF MOTIONS.

Unable to stop the sale of the Debtors’ business assets, Malooof embarked on a campaign in 2006 to undermine and frustrate the Debtors’ bankruptcy proceedings, filing a series of motions seeking to re-open of the Examiner’s investigation and to vacate the Agreed Final Order and the Level Sales Order that were, in each instance, denied by this Court. *See* B.R. 2974: Memorandum of Opinion and Order denying Motion to Reopen the Examiner’s Investigation and for Substitute Examiner (the “First Motion to Reopen”); B.R. 3039: Memorandum of Opinion and Order denying Motion 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 “First Motion to Vacate”), *aff’d*, *William Malooof v. Level Propane Gases, Inc.*, No. 1:07cv0153, slip op. (N.D. Ohio Aug. 16, 2007); B.R. 3037: Memorandum of Opinion and Order denying Renewed and Restated Motion to Reopen Examiner’s Investigation and for Substitute Examiner, *aff’d*, *William Malooof v. Level Propane Gases, Inc.*, No. 1:07cv0103, slip op. (N.D. Ohio Aug. 16, 2007).

On September 5, 2007, just three weeks after the District Court had issued its decisions affirming the denial of the First Motion to Vacate and the Second Motion to Reopen, Malooof filed a Motion to Vacate Conversion Order of June 11, 2002 and Sale Order of Level Propane Going-Concern Assets of June 27, 2003 (the “Second Motion to Vacate”). (B.R. 3140: Second Motion to Vacate). As described by the Court in its February 28, 2008 Memorandum of Opinion

and Order denying the Second Motion to Vacate, Maloof had “latche[d] on to piecemeal statements” in the District Court’s opinion affirming the denial of the First Motion to Vacate “as an invitation to further conduct a fishing expedition and continue his attempt to vacate orders that this Court approved in 2002 and 2003 and that have already been re-examined by this Court as a result of Maloof’s filings.” (B.R. 3253: Memorandum of Opinion and Order at 7). Concluding that the Second Motion to Vacate was barred under the doctrines of finality and laches, the Court observed that:

Although not clear in his Motion, Maloof clarifies in his response to the Debtors' objection that he is alleging four courses of fraudulent conduct: 1) the pre-petition seizure of control of the companies by the Bank Group; 2) document concealment, disposal and destruction to leave no means of testing the accuracy of the customer database; 3) manipulation of the tank count and the customer count in order to misrepresent the customer base level; and 4) waylaying of customer payment checks before assets were sold. Maloof further alleges that these four courses of fraudulent conduct, and evidence attached to support the courses of conduct, are proof that there existed a conspiracy to conceal and destroy the going concern value of Level Propane. Despite Maloof’s assertions to the contrary, this is simply a recasting of the arguments he has repeatedly and unsuccessfully made before this Court and on appeal.

(Id. at 8-9). Further, having examined and considered each of the more than 20 exhibits attached to the Second Motion to Vacate, the Court found that they “offer no support for [Malooof’s] vague conspiracy allegations”, do “not lead to a conclusion that the Debtors’ going concern value was purposely deflated”, and “fail to demonstrate fraud upon this Court.” (Id. at 10, 11). The Court therefore denied the Second Motion to Vacate and entered judgment accordingly. (B.R. 3254: Judgment). Maloof appealed that judgment to the District Court (B.R. 3255: Notice of Appeal), where that appeal remains pending. *See William Maloof v. Level Propane Gases, Inc.*, No. 1:08cv679 (N.D. Ohio).

Notwithstanding his appeal of the Court’s denial of the Second Motion to Vacate, on June 18, 2008, Maloof filed his Motion to Vacate Pursuant to R. 60(b)(2) the Court’s Decision of

February 28, 2008 Denying Motion to Vacate Agreed Conversion Order and Sale Order (the “Third Motion to Vacate”). (B.R. 3348: Motion to Vacate Pursuant to R. 60(b)(2)). In that motion, Maloof asked the Court to vacate and reconsider its decision denying the Second Motion to Vacate and to vacate the Agreed Final Order and the Level Sale Order based on a set of purported electronic messages he claimed to have just discovered and attached to the motion. Virtually all of these alleged messages were dated prior to the filing of the Involuntary Petition six years earlier and purported to evidence a “check concealment scheme” undertaken by a Level employee, John Verbos (“Verbos”) in supposed conjunction with Richard Anter (“Anter”).

The Court conducted a hearing on Maloof’s request for an evidentiary hearing in connection with the Third Motion to Vacate and the Debtors’ motion for expedited discovery on July 8, 2008. At that hearing, it issued a bench ruling denying Maloof’s request for lack of jurisdiction with respect to the underlying motion. It further found that, in the absence of jurisdiction with respect to Third Motion to Vacate, the Debtors’ request for expedited discovery was moot but that the electronic files in Maloof’s possession were property of Debtors’ estate pursuant to 11 U.S.C. § 541(a) and thus subject to turnover under 11 U.S.C. § 542(e). Accordingly, it entered an order on July 18, 2008, directing Maloof to turnover the electronic records within five days. (B.R. 3376: Order Directing Turnover of Debtors’ Records). It then issued a written decision on July 28, 2008, reflecting its bench ruling on Maloof’s request for an evidentiary hearing and denying the Third Motion to Vacate on jurisdictional grounds. (B.R. 3388: Memorandum of Opinion and Order). Maloof did not seek appellate review of the denial of the Third Motion to Vacate but did appeal to the District Court from the Order Directing Turnover. *See William Maloof v. Level Propane Gases, Inc.*, No. 08cv2097 (N.D. Ohio) (appeal pending). Despite the Court’s order directing that Maloof turnover the electronic records in his

possession that supposedly evidenced the alleged “check concealment scheme,” he never did so, thereby preventing the Debtors from engaging in any efforts to determine the authenticity of the messages, which Verbos had denied under penalty of perjury. (See B.R. 3365: Objection to Motion to Dissolve Protective Order at Ex. A, Declaration of John Verbos).

C. CONFIRMATION OF THE DEBTORS’ PLAN.

On March 21, 2008, the Debtors filed their Motion for Order (i) Pursuant to Bankruptcy Code Section 1125 Approving Disclosure Statement; (ii) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, and (iii) Establishing Voting Record Date, seeking, *inter alia*, the Court’s approval of a disclosure statement in connection with a joint liquidating plan proposed by the Debtors and the Official Committee of Unsecured Creditors of Level Propane Gases, Inc. (the “Committee” and, collectively with the Debtors, the “Plan Proponents”). (B.R. 3290: Disclosure Statement Motion). On April 5, 2008, Maloof filed an objection to this motion, in which he attacked the proposed Disclosure Statement for its “failure” to parrot the allegations he had been making for the prior two years:

The proposed Disclosure Statement . . . fails to provide adequate information for the reason that it has not addressed the issues of fraud upon the court, which includes the document despoliation, the compromises of the customer database and the customer tank, and the waylaying of millions of dollars in customer payments made to Level Propane prior to the sale of its going concern assets in 2003, see the Motion to Vacate (Docket Item No. 3140, as amended). . . .

Without a full iteration of the frauds committed, it is sufficient to say that courses pursued by the lead creditor in these proceedings, generally referred to as the Bank Group . . . had as their achieved object the seizure of the going concern of the Debtors, particularly Level Propane Gases, Inc., in order to deliver the going concern to Amerigas, L.P. As set out by the [Second] Motion to Vacate, these parties choked off every other avenue of relief for the businesses, so that the only buyer left was Horizon Propane, Amerigas, L.P.’s straw man.

(B.R. 3306: Objection at ¶¶ 2-3).

At a hearing on May 27, 2008, the Court denied Maloof's objection to the extent it was predicated on the "failure" to disclose these allegations, but sustained it in part based on various concerns expressed by the Court regarding the financial disclosures made in the proposed Statement. The Plan Proponents thereafter twice amended the proposed Disclosure Statement to meet these concerns. (See B.R. 3341 and 3374). On July 7, 2008, Maloof filed yet another objection to the proposed Disclosure Statement, this time predicated on the allegations contained in the Third Motion to Vacate.

In light of the [sic] his recently filed R. 60(b)(2) Motion to Vacate, Docket Item No. 3348, shareholder, incorporating its arguments, hereby objects to the Disclosure Statement as proposed, because it fails to disclose the substantial dispute concerning the fraud upon this Court by which these bankruptcy proceedings initiated and have been advanced and depended upon to this date.

(B.R. 3370: Objection at ¶ 1). Following a hearing, the Court entered an order approving the Disclosure Statement, as amended, on July 18, 2008, overruling Maloof's objection in its entirety. (B.R. 3377: Order Approving Amended Disclosure Statement (the "Disclosure Statement Order")). No appeal was filed from that order.

Pursuant to the Disclosure Statement Order, the Debtors solicited acceptances or rejections of the proposed joint liquidating plan (the "Plan") from holders of allowed claims in the designated voting class of creditors. Parties in interest had until September 29, 2008, to file and serve written objections to confirmation of the Plan. Maloof was the only party who filed an objection to the Plan, arguing that the Plan should not be confirmed based on the matters he had raised in his motions to vacate.

The proposed Liquidation Plan is yet another occasion by which those who control the purported Debtors in the proceedings [sic] to ratify the fraud on the court by which these proceedings were initiated and advanced through this Court;

Incorporating by reference the Shareholder's Motion to Vacate, Docket Item No. 3140, as amended [the Second Motion to Vacate], and incorporating further by

reference the Shareholder's arguments set out in his Brief in *Maloof v. Level Propane Gases, Inc.*, Case No. 08-0670 (U.S.D.C, N.D.O.), now pending before the District Court, the objecting shareholder says that these proceedings are a vehicle by which the Bank Group seized control of the going concern of Level Propane with the singular purpose of excluding altogether the Shareholder from the propane marketing industry. That this was the purpose of the Bank Group is born out by the concerted efforts taken, as set out in the Shareholder's Motion to Vacate, seize the going-concern assets so that they could be folded into the assets of Amerigas in October, 2003.

(B.R. 3455: Objection to Proposed Chapter 11 Liquidation Plan at ¶¶ 1 and 2).

The Court conducted a hearing on the Plan Proponents request for confirmation of the Plan on October 7, 2008. Upon hearing the arguments of counsel for Maloof and the Debtors at the hearing, the Court found that Maloof's objection to the Plan was not timely filed, despite adequate notice of the objection deadline, and on October 9, 2008, entered its order confirming the Plan. (B.R. 3471: Order Confirming Joint Plan of Liquidation (the "Confirmation Order")). Maloof sought reconsideration of his objection to the Plan, simply restating verbatim his original objection. (B.R. 3478: Motion for Reconsideration). That motion was denied by the Court in an order entered November 20, 2008. (B.R. 3510: Order Denying Motion for Reconsideration). Neither Maloof nor any other party in interest appealed from the Confirmation Order.

Under the Plan as confirmed by the Court (the "Confirmed Plan"), Mark Uhrich was appointed to serve as plan administrator of the consolidated estate of the Debtors as of the Confirmed Plan's effective date. On October 23, 2008 (the "Effective Date"), the Plan Administrator took possession of the consolidated estate's assets and commenced his appointment. Notice of the Effective Date was filed and served on all entitled parties. (B.R. 3487). In accordance with the Confirmation Order, all injunctions and releases contained in the Confirmed Plan and the Confirmation Order went into effect on the Effective Date. (See, e.g., Confirmation Order at ¶ J). As Maloof acknowledges (Complaint at ¶ 1), his equity interest in

the Debtors was cancelled upon the Effective Date by operation of the Plan. (See Plan at § 4.4). Further, on the same day it entered the Confirmation Order, the Court entered an order disallowing Maloof's purported unsecured claim in its entirety. (B.R. 3470: Order Sustaining Debtors' Objection to Claim No. 208).

D. THE COMPLAINT.

Maloof filed his Complaint in this adversary proceeding on May 7, 2009, asking that the Court revoke the Confirmation Order pursuant to section 1144 of the Bankruptcy Code, 11 U.S.C. § 1144, and "enjoin enforcement" of the Agreed Final Order, the Level Sale Order, and the Park Place Sale Order. Maloof devotes most of his Complaint to recounting the allegations of conspiracy and fraudulent schemes he repeatedly raised in his various motions and objections during the more than two and a half years prior to the entry of the Confirmation Order. Specifically, Maloof alleges: (1) an improper seizure of control of the Debtors by the Debtors' lenders (Complaint at ¶¶ 13-14, 17-23, 25 and 30); (2) the concealment and destruction of documents regarding Debtors' customer base (id. at ¶¶ 17, 21, 23 and 26-28); (3) the manipulation of tank counts and customer counts (id.); and (4) the concealment of customer payment checks. (Id. at ¶¶ 17, 22, 26 and 28). With minor variations, these allegations are indistinguishable from the allegations made by Maloof in the Second and Third Motions to Vacate and "incorporated by reference" into his objections to the proposed Disclosure Statement and confirmation of the Plan. However, as he has done in the past, Maloof expands his allegations of fraud to include new alleged participants at whom he levels accusations without supporting evidence.

Following this recitation, Maloof alleges that the Plan Proponents "made specific misrepresentations to this Court and fraudulently concealed the wrongdoing [alleged in the

Complaint.]” (Complaint ¶ 33). Maloof also alleges that the Plan Proponents knew that the claims being asserted in certain state court litigation against the law firm of Squire, Sanders & Dempsey, *Level Propane Gases, Inc. v. Squire, Sanders & Dempsey*, Cuyahoga County Court of Common Pleas Case No. 02-CV-469882 (the “SS&D Litigation”) “would not yield the funding represented[.]” (Id. at ¶ 32). Finally, Maloof alleges that the Plan Proponents “failed to disclose the merits” of Maloof’s appeal from the Court’s order approving the D&O Compromise. (Id. at ¶ 31). Based on these allegations, Maloof asks that the Confirmation Order be revoked and that the Court “enjoin enforcement” of the Agreed Final Order, the Level Sale Order, and the Park Place Sale Order.

III. LAW AND ARGUMENT

A. THE STANDARD UNDER FED.R.CIV.P. 12(b)(6).

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) tests the sufficiency of the complaint. The Court views the complaint in a light most favorable to the plaintiff, *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir.1998), assumes the plaintiff’s factual allegations are true, *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 996 (6th Cir.1994), and determines whether the plaintiff has pleaded “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).

This standard, however, “requires more than the bare assertion of legal conclusions.” *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir.1997) (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir.1995), *cert. denied*, 516 U.S. 1158, 116 S.Ct. 1041, 134 L.Ed.2d 189 (1996)). *See also Twombly*, 127 S.Ct. at 1964-65 (“more than labels and conclusions” are required and “a formulaic recitation of the elements of a cause of action will not do”). Only well-pleaded facts must be taken as true.” *Lewis v. ACB Business Servs., Inc.*, 135

F.3d 389, 405 (6th Cir. 1998). The complaint must contain direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *Twombly*, 127 S.Ct. at 1969; *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir.1993). Accordingly, “[a] motion to dismiss under Rule 12(b)(6) will be granted if the complaint is without merit due to an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or where the face of the complaint reveals that there is an insurmountable bar to relief.” *Davis v. DCB Financial Corp.*, 259 F.Supp.2d 664, 669 (S.D. Ohio 2003) (citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978)).

It is also well-settled that the Court may consider matters of which it can take judicial notice under Fed.R.Evid. 201, including public court records, in determining a motion to dismiss made pursuant to Fed.R.Civ.P. 12(b)(6) without converting the motion to one for summary judgment. *See, e.g., Winget v. JP Morgan Chase Bank, N.A.* 537 F.3d 565, 576 (6th Cir. 2008) (the district court could examine objections previously ruled on by the bankruptcy court to determine whether the movant’s current objection was based largely on the same claims); *Paley v. U.S.*, 349 F.3d 418, 425 n. 5 (7th Cir. 2003) (court is entitled to take judicial notice of matters in public record in resolving motion to dismiss); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 16-17 (1st Cir. 2003) (court should consider not only complaint but also matters of public record susceptible to judicial notice in dismissing action). Such consideration is particularly warranted here, where the Complaint references significant portions of the history of these bankruptcy cases and orders entered by this Court. Thus, this Court may consider the history of the Debtors’ cases and this Court’s orders in the Debtors’ cases in dismissing the Complaint without converting this Motion into a motion for summary judgment.

B. THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER SECTION 1144 OF THE BANKRUPTCY CODE.

Section 1144 of the Bankruptcy Code, in relevant part, provides:

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.

11 U.S.C. § 1144 (emphasis supplied). Because the order must have been “procured by fraud,” only fraud directed at the bankruptcy court “will provide the foundation for vacating an order of confirmation.” *First Union National Bank of Florida v. Perdido Motel Group, Inc.*, 142 B.R. 460, 464 (N.D.Ala. 1992). Accordingly, in order to obtain revocation of a confirmation order under this statute, the plaintiff must plead and prove: (1) that a plan proponent made a representation regarding compliance with section 1129 of the Bankruptcy Code that was materially false; (2) that the plan proponent knew the representation was false, believed it to be false, or made the representation with reckless disregard for the truth; (3) that the representation was made with the intent to induce the court to rely upon it; (4) that the representation was in fact relied upon by the court; and (5) that as a result of the reliance, the confirmation order was entered. *Tenn-Fla Partners v. First Union National Bank of Florida (In re Tenn-Fla Partners)*, 226 F.3d 746, 750 (6th Cir. 2000). The non-disclosure of facts to the bankruptcy court can satisfy these elements only where there has been: (1) an intentional omission; (2) by a party with a duty to disclose; (3) of facts that would be material to finding the party complied with section 1129; (4) that were withheld so that the court would find the party complied with section 1129; and (5) that as a consequence of such non-disclosure, the court entered the confirmation order. *Tenn-Fla Partners v. First Union National Bank of Florida (In re Tenn-Fla Partners)* 228 B.R. 720, 731 (W.D. Tenn 1999), *aff’d*, 226 F.3d 746 (6th Cir. 2000).

Maloo asserts that the Confirmation Order should be revoked because the Plan Proponents “made specific misrepresentations to this Court and fraudulently concealed the wrongdoing, [alleged in the Complaint.]” (Complaint at ¶ 33). At no point, however, does Maloo identify a single, specific affirmative misrepresentation by the Plan Proponents in connection with the proceedings leading to the Confirmation Order. The closest Maloo comes in this regard is his allegation that the Plan Proponents “continued to represent the [SS&D Litigation] as a source of funding for the Plan, and induced the Court to rely on the claim as a source of such funding.” (Id. at ¶ 32). Maloo never alleges where, when or how this supposed “representation” was made to the Court.

In fact, no such representation was ever made by the Plan Proponents. To the contrary, the Amended Disclosure Statement approved by the Court on July 17, 2008, specifically states that “[t]he net recovery in the SS&D Litigation, if any, will be distributed to holders of certain Allowed Claims pursuant to the terms of the Litigation Proceeds Sharing Agreement, as incorporated in the Plan.” (B.R. 3374: Amended Disclosure Statement at 22, ¶ U, emphasis supplied). Consistent with this statement, the distribution analysis for the Plan showed how the Consolidated Estate’s assets would be distributed if zero proceeds were recovered as a result of the SS&D Litigation. (Id. at Ex. 2, Schedule 2). The Plan Proponents simply never made any representation to the Court regarding the merits of or likely proceeds from the SS&D Litigation.

Maloo also alleges that the Plan Proponents “failed to disclose the merits” of Maloo’s appeal from the Court’s order approving the D&O Compromise. (See B.R. 3266: Order Granting Motion to Compromise). According to Maloo, the Plan Proponents somehow “dismissed” those merits “by assuring this Court that the settlement would be affirmed on appeal.” (Complaint at ¶ 31). Here again, Maloo fails to allege any specifics as to when such

“assurance” was provided to the Court. Nor does he ever allege what “merits” the Plan Proponents were supposed to disclose about Maloof’s appeal. Absent such allegations, it is impossible to conclude that the Plan Proponents in anyway misled the Court into believing that receipt of the proceeds from the D&O Compromise was a certainty. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) (feasibility standard of section 1129(a)(11) is whether plan offers reasonable assurance, not guarantee, of success); *In re Ridgewood Apartments*, 183 B.R. 784, 789 (Bankr. S.D.Ohio 1995) (satisfaction of feasibility requirement does not require that meeting economic projections is certainty).

Nor does Maloof’s assertion that the Plan Proponents “concealed” from the Court the allegations of supposed “wrongdoing” that take up the bulk of the Complaint state a claim for revocation of the Confirmation Order. As an initial matter, Maloof makes no factual averments that, if true, would show the materiality of those allegations to the confirmation proceedings. A material fact in the context of a claim under section 1144 is “information that is necessary for a court to decide whether the elements prescribed for confirmation have been satisfied.” *Tenn-Fla Partners*, 228 B.R. at 735. Maloof offers nothing more than the bald legal conclusion that “the unlawfulness of these proceedings make any approval of a Liquidation Plan . . . impossible as a matter of law.” (Complaint at ¶ 33). Even if this assertion had anything to do with the “feasibility” requirement of section 1129(a), it is neither alleged nor possible to understand how Maloof’s allegations of “wrongdoing” rendered the Debtors’ chapter 11 proceedings “unlawful” or otherwise prevented the Court from confirming the Plan.

No less dispositive is the absence of any allegations in the Complaint giving rise to the inference that the Plan Proponents had a “duty to disclose” the allegations of wrongdoing. For more than two years prior to the entry of the Confirmation Order, virtually all that the Debtors

and the Court had been doing in the underlying proceedings was addressing those very allegations. As a consequence, the Court was well aware of those allegations at the time it entered the Confirmation Order.

Indeed, no duty on the part of the Plan Proponents to “disclose” those allegations can be found in light of the Court’s denial of Maloof’s objections to the proposed Disclosure Statement asserting that the Statement was deficient precisely because it did not disclose the “schemes” he alleged. (See B.R. 3306 and 3370). As a matter of law, the Plan Proponents cannot be found to have “fraudulently concealed” matters from the Court when the Court specifically found that no duty to disclose such matters existed when it overruled Maloof’s objections. Maloof is, in fact, barred and estopped from attempting to relitigate this issue under the doctrines of issue preclusion and law of the case. See *Trafalgar Corp. v. Miami County Bd. of Commr’s*, 519 F.3d 285, 287 (6th Cir. 2008) (doctrine of issue preclusion holds that fact or point that “was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties”); *United States v. Mendez*, 498 F.3d 423, 426 (6th Cir. 2007 (“Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation.”)).

It is for this same reason that Maloof not only does not, but cannot, allege that the Court relied upon the “non-disclosure” of purported wrongdoing in entering the Confirmation Order. It can only be assumed that Maloof fails to allege this essential element of a section 1144 claim because the Court plainly knew of the supposed “scheme” to “seize” the going concern assets of Level at the time it confirmed the Plan; those allegations had been repeated *ad nauseum* by Maloof in virtually every pleading, motion and objection he had filed with the Court since the

entry of the Level Sale Order. The Court had repeatedly rejected those allegations and the materials Maloof had proffered in attempt to substantiate his charges, finding that they “offer[ed] no support for [Maloof’ s] vague conspiracy allegations”, did “not lead to a conclusion that the Debtors’ going concern value was purposely deflated”, and “fail[ed] to demonstrate fraud upon this Court.” (B.R. 3253: Memorandum of Opinion and Order at 10, 11). Simply put, in light of the record in the underlying proceedings, there could never be a finding that the Plan Proponents “concealed” the allegations of wrongdoing from the Court or that, as a consequence of such “non-disclosure,” the Court entered the Confirmation Order.

In sum, the Complaint fails to state a claim for relief under section 1144 of the Bankruptcy Code, failing to allege the essential elements of such a claim. Moreover, it is apparent based on the record in the underlying chapter 11 proceedings, that Maloof cannot ever state such claim consistent with the obligations of Fed.R.Civ.P. 11. Accordingly, not only should Maloof’s claim for revocation of the Confirmation Order be dismissed, but such dismissal should be without leave to replead. *See Hoover v. Langston Equipment Associates, Inc.*, 958 F.2d 742, 745-46 (6th Cir. 1992).

C. THE COMPLAINT FAILS TO STATE ANY “COLLATERAL” CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The Complaint also contains three “collateral” claims for injunctive relief in which the Maloof asks the Court to “enjoin enforcement” of the Agreed Final Order, the Level Sale Order and the Park Place Sale Order (collectively, the “Collateral Claims for Relief”). (Complaint at ¶¶ 34-38). However, Maloof does not set forth any allegations that, if true, would establish an entitlement to the requested injunction. A plaintiff seeking a permanent injunction must plead and prove four factors:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

Ebay Inc. v. Mercexchange, L.L.C., 547 U.S. 388, 126 S.Ct. 1837, 1839 (2006). The Complaint fail to contain any allegations pertaining to these four factors. Indeed, it is impossible to understand the request for an injunction against “enforcement” of the orders at issue, since they ask the Court to revisit matters decided at the dawning of these cases and undo sales long since consummated. There is nothing in those orders requiring “enforcement” of any sort. For these reasons alone, the Collateral Claims for Relief should be dismissed.

Further, it would appear that Maloof, once again, seeks to have three orders that are the subject of the Collateral Claims for Relief declared void for fraud on the court. The Sixth Circuit requires a party alleging fraud on the court to plead and prove five elements: (1) conduct on the part of an officer of the court; (2) that is directed at the “judicial machinery” itself; (3) and that consists of intentionally false statements; (4) that are averments or concealments when under a duty to disclose; and (5) that actually deceive the court. *See, e.g., Workman v. Bell*, 245 F.3d 849, 852 (6th Cir.), *cert. denied*, 532 U.S. 954 (2001); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993), *cert. denied*, 513 U.S. 914 (1994). “[T]hese elements . . . require that the individual accused of perpetrating the fraud have directly interacted with the court to ‘prevent an adversary from presenting his case fully and fairly.’” *Computer Leaseco, Inc. v. NTP, Inc.*, 194 Fed. Appx. 328, 338, 2006 WL 2572057 at *10 (6th Cir. Sept. 6, 2006) (quoting *Demjanjuk*, 10 F.3d at 354).

Here, the nearest Maloof comes to alleging an “intentionally false statement” to the Court in connection with any of the three orders are his averments that “Officers of the Court” made

representations to the Court in connection with the Level Sale Order that “the going-concern assets were sold as the result of a fair and impartial auction procedure” and that “the bidding procedure was followed to attract the best bids by the best qualified bidders. . . .” (Complaint at ¶¶ 36 and 37).³ These generalized averments, failing to disclose who purportedly made the statements or when and how they were communicated to the Court, do not come close to meeting the requirements for pleading fraud under Fed.R.Civ.P. 9(b). *See Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005) (plaintiff claiming fraud must allege the time, place, and content of the alleged misrepresentations; quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)). Nor does the Complaint contain any operative factual allegations regarding how the court-approved auction of the Level assets was supposedly “fraudulently manipulated.” Absent such detailed allegations, neither the Plan Administrator nor the Court can even begin to assess the claim the assertion that any statements made to the Court in connection with the Level Sales Order were “knowingly false representations to the Court.”

Finally, the Confirmation Order “constitutes a final judgment in [the] bankruptcy proceeding” that, pursuant to 11 U.S.C. § 1141(a), is binding on all creditors and equity security holders. *Sanders Confectionary Prods., Inc. v. Heller Financial Inc.*, 973 F.2d 474, 480 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993). “Confirmation of a plan of reorganization by the bankruptcy court has the effect of a judgment by the district court and res judicata principles bar relitigation of any issues raised or that could have been raised in the confirmation proceeding.” *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 463 (6th Cir. 1991). *See also Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002) (quoting *Sanders*

³ Maloof makes no attempt to suggest even the content of the “fraudulent misrepresentations” that were allegedly made to the Court in connection with the sale of Park Place, Inc. assets. (See Complaint at ¶ 38).

Confectionary and Chattanooga Wholesale). These principles prevent Maloof from attempting to litigate his allegation that the orders that are the subject of the Collateral Claims for Relief should be declared “null and void” as products of fraud on the court. Accordingly, the Collateral Claims for Relief should be dismissed, with prejudice, as a matter of law.

IV. CONCLUSION.

For the foregoing reasons and authorities cited, the Plan Administrator respectfully requests that the Court grant its motion by entering an order dismissing the Complaint and grant the Plan Administrator such other and further relief as the Court finds to be just and equitable.

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Respectfully submitted,

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