

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

In Re:)	Case No. 02-16172
Level Propane, Gases, Inc., et. al.)	
Debtors.)	Ch. 11
)	
*****)	Hon. Randolph Baxter
William H. Maloof,)	
Plaintiff)	Adv. Pro. Case No. 09-1127
)	
Vs.)	
)	
Mark Uhrich, Plan Administrator)	
of the Consolidated Estate of)	
Level Propane Gases, Inc.)	
Defendant)	

**OPPOSITION OF WILLIAM H. MALOOF TO
DEFENDANT’S MOTION TO DISMISS**

Now comes William H. Maloof, by and through counsel undersigned, and for his Opposition to Defendant’s Motion to Dismiss states as follows:

INTRODUCTORY STATEMENT

The Defendant has moved to dismiss the above-captioned Complaint to Revoke Confirmation of Plan. He has argued that because this Plaintiff’s earlier motions to revisit orders of this Court have been denied for insufficient evidence, this Plaintiff’s Complaint fails to state a cause of action. These same arguments have been advanced as well in *Wilhelm v. Uhrich*, Adv. Pro. No. 09-1116 and *Maxus Leasing Group v. Uhrich*, Adv. Pro. No. 1118, both of which are before this Court. These arguments feign outrage as cover for indefensible fraud and as such are insults to the Court.

A motion made pursuant to R. 12(b)(6) will prevail only when the allegations in a complaint do not make out a cause of action. Plaintiff has had the opportunity to review both the Motions and the Oppositions in both the *Wilhelm* and *Maxus* cases as he frames his response to the Defendant's Motion in this case. The procedural facts that pertains in those cases pertains here: this complaint sets out allegations that must be taken as true, and as such, stand on their own to make out this cause of action under 11 U.S. C. Sec. 1144. As argued below, no Motion to Dismiss of his complaint can be premised on argument addressed to evidence previously presented when it is the allegations and only the allegations that must be tested in a Motion to Dismiss, not their proof.

LAW AND ARGUMENT

The Defendant seeks a dismissal of this Complaint to Revoke Confirmation on the premise that the allegations set out in the Complaint do not state a cause of action under R. 12(b)(6). The Plaintiff will argue below that the Defendant, in seeking this dismissal, wants to regard evidence and allegation as one and the same, when the rule is well established that for purposes of a Motion to Dismiss, all of the allegations set out in the complaint are to be taken as true, as well as all reasonable inferences that can be taken from those allegations. The Defendant would also have the Court confine its inquiry into whether the Debtors made a specific misrepresentation in its plan proposal or in the hearings of the proposed plan, when, as the Plaintiff argues below, the statute, 11 U.S.C. Sec. 1144 and the case law interpreting it, make it clear that the Debtor must have acted honestly throughout these Chapter 11 proceedings as a whole and any misconduct during these proceedings leading up to the plan proposal will result in that proposal being made in bad faith, and therefore subject to revocation.

**THE PLAINTIFF STATES A CAUSE OF ACTION NOT SUBJECT TO DISMISSAL
PURSUANT TO R. 12(b)(6), F.R.C.P.**

The Defendant has moved this Court to dismiss this Complaint pursuant to R. 12(b)(6), F.R.C.P. The rule provides that a Complaint may be dismissed for “failure to state a cause of action.” The case law interpreting this provision bears review. Contemporary analysis of this provision began with *Conley v. Gibson* 355 U.S. 41, 78 S.Ct. 99 (1957), which famously held that no complaint can be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” 355 U.S. at 45, 78 S.Ct. at 102. The *Conley* Court reversed the lower court ruling and allowed the case to go forward because it “had no doubt that the petitioners’ complaint set forth a claim and gave the respondents fair notice of its basis,” 355 U.S. at 48, 78 S.Ct at 102. The breadth of this statement has been the occasion for extensive comment since in this circuit, among others, and in subsequent Supreme Court opinions. A more recent case has stated *Conley*’s observation regarding R. 12(b)(6) by stating that such dismissal is proper “only when if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spaulding* 467 U.S. 69, 73, 104 S.Ct. at 2229 (1984), cited in *Sistrunk v. City of Strongsville* 99 F.3d 194, 197 (6th Cir., 1996) and *Bloch v. Ribar* 156 F.3d 673, 677 (6th Cir., 1998).

The policy behind this exacting rule in favor of complaints tested by motions brought under R. 12(b)(6) is the recognition that: “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims,” *Scheur v. Rhodes* 416 U.S. 232, 237, 95 S.Ct. 1683, 1686 (1974.) This pertains to claims of fraud or mistake as well, *Scherkiewicz v. Sorema, N.A.* 534 U.S. 506, 513 ftnt. 3, 122 S.Ct. 992, 999

(2002.) Following *Scherkiewicz, Bell Atlantic v. Twombly* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007) requires that “Factual allegations must be enough to raise a right to relief above the speculative level.” So long as facts are presented that make out a cause of action, a complaint must survive a challenge made under R. 12(b)(6), for “What Rule 12(b)(6) does not countenance are dismissals based on a judge’s disbelief of a complaint’s factual allegations, *Nietzke v. Williams* 490 U.S. 319, 327, 109 S.Ct. 1827, 1832 (1989), followed in this Circuit by *Lawler v. Marshall* 898 F.2d 1196, 1199 (6th Cir., 1990.)

In light of the foregoing, the Defendant’s motion must be unavailing, since, as articulated below, the Confirmation of the Plan in this case was a product of fraud, and that fraud has been fully set out with particularity in this Complaint. The Defendant cannot evade a test of this fraud by stating on the one hand that no material fraud has been alleged when the frauds go to the very heart of these proceedings, and on the other inveigh the Court to disbelieve the allegations because it has not seen sufficient evidence heretofore to clearly and convincingly demonstrate fraud in prior motions to vacate.

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THE DEFENDANT’S ATTEMPTS TO SMUGGLE AFFIRMATIVE DEFENSES BASED ON PRIOR RULINGS MUST BE UNANVAILING.

The Defendant claims that because this Court did not find the Disclosure Statement omitting the Plaintiff’s allegations of fraud on the Court was deficient, the Plaintiff is barred from making out a claim of fraud under 11 U.S.C. Sec. 1144. On the claim of issue preclusion, he asks this Court to liken itself to a federal court honoring a state judgment, *Trafalgar Corp. v. Miami County Board of Commissioners* 519 F.3d 285, 287 (6th Cir., 2008) in which the same federal takings claim was articulated. To support his argument as to res judicata, the Defendant

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cites *Winget v. JP Morgan Chase Bank* 537 F.3d 565 (6th Cir., 2008). On the claim of law of the case, he asks this Court to liken itself to a trial court in receipt of an appellate ruling by which it was bound, *United States v. Mendez* 498 F.3d 423, 426 (6th Cir., 2007.) Finally, he asks that this court take judicial notice of prior proceedings which he claims preclude the Plaintiff from making any claim under 11 U.S.C. Sec. 1144, *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.* 181 F.3d. 410 (3rd Cir., 1998).

Each of these points and each of these cases have absolutely no bearing on this case and these allegations. The rule in *Trafalgar Corp, supra*, that the ruling of another court must be enforced as to the same issue and the same parties has no application here: this is the same court that has continued to disbelieve the Plaintiff. The rule set out in *Winget, supra*, decided whether a party to a bankruptcy can withdraw objections to a Sale Order under the Bankruptcy Code, then later sue in District Court on the same facts, 537 F.3d at 579, in contrast to this Plaintiff's consistent experience of this Court's disbelief. The rule set out in *Mendez, supra*, has no application: there is no law of the case here from any reviewing court that precludes the Plaintiff's claim, indeed the ruling of Judge Aldrich in 2008 (*Maloof v. Level Propane Gases, Inc.*, Case No. 07-0153, Case No. 07-0153 (U.S.D.C., N.D.O.) all but invited the Plaintiff to bring his new evidence into Court¹, which he has, and which remains on appeal before Judge Oliver (*Maloof v. Level Propane Gases, Inc.*, Case No. 08-0679, U.S.D.C., N.D.O.)

Any prior ruling of this court is simply a statement of this Court's disbelief of the Plaintiff's allegations, which, as articulated above cannot be a basis for dismissal, *Nietzke, supra*,

1.) If there is a law of this case, it is Judge Aldrich's statement that: "The Court finds the *Hazel-Atlas* line of cases to stand for the proposition that where fraud on court can be proved, even a final judgment may be upset in the interest of justice," *Maloof v. Level Propane Gases, Inc.*, Case No. 07-0153 (U.S.D.C., N.D.O.) Opinion, Docket Item 20, at 5.

Lawler, supra. Finally, *Southern Cross, supra*, has no application here because the plaintiff was barred by the statute of limitations notice provided by a prior judgment, not by the holding or rule set out in the prior judgment, see at 181 F.3d at 428-429. Whether the facts as proven will make out the Plaintiff's claims is for another day, but for this day this case cannot be dismissed on the basis of any of these preclusion arguments.

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**THE CONCEALMENTS OF THE DEBTORS WERE MATERIAL TO THE
CONFIRMATION PROCEEDINGS.**

Contrary to the Defendant's assertion, the facts alleged to have been concealed were material to the Confirmation Proceedings, *In Re: Kostoglou* 73 B.R. 596 (N.D.O., 1987), *In Re: Coffee Cupboard* 119 B.R. 14 (E.D.N.Y, 1990), *In Re: Tenn-Fla Partners* 170 B.R. 946 (W.D. Tn., 1994). That the Debtors sought the Court's Confirmation based on a plan that advanced an unlawful scheme is sufficient basis to maintain an action under 11 U.S.C. Sec. 1144. The Plaintiff has alleged that the Plan was proposed in bad faith, and was, consequently in violation of 11 U.S.C. Sec. 1144 as a fraud upon the court. The Plaintiff alleges that the Debtors' Plan was proposed in furtherance of the fraudulent filing and maintenance of the Chapter 11 proceeding. As such, the Plan was impossible to approve because it was proposed in bad faith furtherance of the fraud alleged in paragraphs 9-30 of the Complaint.

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**The Court's Decisions Regarding Motions Previously Made have no Bearing on the Merits
of the Plaintiff's Allegations.**

The Defendant argues strenuous from the history of the Plaintiff's prior motion practice, that the Court has heard and rejected the allegations in the Complaint. The pleadings to which the Defendant refers, were previously filed Motions to Vacate of the Plaintiff and motion to

reopen the Examiner's investigation. This Court decided these Motions to Vacate which required clear and convincing evidence of wrongdoing before an analysis of the sufficiency of any allegations were even reached. In this Court's Opinion denying Maloof's September, 2007, Motion to Vacate (B.R. 3253) it decided whether the evidence submitted provided clear and convincing proof of fraud upon the Court. In deciding on the evidence, it could never reach whether the allegations the evidence was submitted to support set out such fraud. The Debtors' resistance to the Motions was in itself fraudulent conduct in that they were made with the fraudulent intent of preventing the Court from reaching the merits of the allegations. The focus of all of the Motions was evidentiary: the allegations themselves were never approached. Even the Court's language the Defendant cites bears this out: the submissions "offer[ed] no support for [Malooof's] vague conspiratorial allegations, did "not lead to a conclusion that the Debtors' going concern value was purposely deflated" and "failed to demonstrate fraud on the Court."

Were this Court to rely on its prior orders, based on only such evidence that the Plaintiff could glean without court process and subjected to the "clear and convincing" standard of proof, then this Court would grant the Defendant's Motion to Dismiss simply because it did not believe the allegations in the complaint. The Court may not grant Defendant's Motion to Dismiss simply because it does not believe the allegations in a Complaint, *Lawler, supra*, citing *Nietzke, supra*, which held:

What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support," 490 at 327, 109 S.Ct. at 1832.

For this Court to dismiss the Complaint based on its prior assessment of the Plaintiff's submissions is for the Court to do just that: dismiss the Complaint because it does not believe the allegations.

Similarly, when this Court denied the Plaintiff's June, 2008, R.60(b)(2) Motion (B.R. 3388) it did so for want of jurisdiction due to a pending appeal. The Plaintiff's fraud allegations were not addressed. Finally, the Plaintiff's Objection to the Plan was denied only because it was untimely, not on the basis of any of its allegations (B.R. 3471.) In like manner, the motions to reopen the Examiner's investigation were denied because this Court did not deem the Estate capable of bearing the additional expense.

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The Plaintiff states a Cause of Action Under 11 U.S.C. Sec. 1144.

Under 11 U.S.C. Sec. 1144, the Plaintiff stands on wholly different footing than he did when he made his Motions to Vacate: his complaint must, at the outset, only allege that the Debtors acted with fraudulent intent in the bankruptcy and that the Confirmation was a result of that fraud. It is by no means limited to fraud in the hearings leading to confirmation of the plan, but to the entire bankruptcy, *Kostoglou, supra, Coffee Cupboard, supra*. In *Kostoglou, supra*, the Court was aware of the existence of the real estate upon which the bankruptcy turned, the values assigned to the real estate and of the market in which that real estate was offered or would be offered for sale 76 B.R. at 599-600. The *Kostoglou* Court, rejecting the arguments in the Debtor's Motion to Dismiss the Revocation Complaint said:

"In re Roukous, 12 Am.B.R. 128 (D.R.I.1904), the court was faced with a Petition to set aside a composition for fraud under Sec. 13 of the Bankruptcy Act, which Section is analogous to current Sec. 1144 of the Bankruptcy Code. The Petition set forth as its basis the making of an oath in the debtor's Schedules and the concealment of property. The debtor relied upon Throckmorton in opposing the

Petition to set aside. In overruling the debtor's demurrer to the Petition, the court stated:

'Upon the bankrupt's construction of Sec. 13, if a creditor believes a bankrupt's oath, makes no further inquiry, and learns of no fraud, he is absolutely precluded from setting up frauds which would have been a bar if discovered and urged before the confirmation. A construction which would require a creditor to disregard a bankrupt's oath to his Schedule, and to make an independent investigation into the bankrupt's affairs before agreeing to the composition, under penalty of being finally precluded by the confirmation thereof, would be unreasonable. Compositions are ordinarily made with a view to a speedy settlement. It is not a requirement of ordinary diligence that a creditor should assume a bankrupt to be guilty of a false oath, and, upon such assumption, make in each case, an independent investigation before agreeing to the terms of the composition.'

The theory upon which *Roukous* was decided is equally applicable in cases under the Bankruptcy Code. *Debtors' construction of Sec. 1144 would render that Section ineffective in its goal to insure that honesty accompanies all reorganization proceedings before a bankruptcy court. Any policy of finality of judgments, upon which Throckmorton was decided, must take a backseat to that all-important policy of honesty in connection with bankruptcy proceedings. Therefore, Debtors' Motion to Dismiss is overruled in this regard, also," 76 B.R. at 599-600, emphasis supplied.*

This test articulated was whether the Court confirmed the plan as a result of the proponent's conduct in the bankruptcy proceedings made with fraudulent intent, not the Court's own knowledge, see also, *In Re: Tri-Cran* 98 B.R. 609 (D. Mass., 1989.) Under *Kostoglou*, the Plaintiff's statement in Paragraph 32 of the Complaint that because the proceeding were unlawful as a result of fraud, the Confirmation of the Plan, which relied on that unlawful conduct, was itself a product of that fraud, states a cause of action. *Kostoglou* made emphatic what *Tenn-Fla* applied: that any plan that relies on fraud is subject to revocation.

In *Tenn-Fla Partners, supra*, upon which the Defendant relies exclusively, the Debtors acted with fraudulent intent when they parked offers on the apartment complex that was the sole asset in the estate so that the bondholders would be forced to discount their bonds as part of their approval of the plan, when the actual offers the Debtors had solicited would have yielded them,

the bondholders, full payment. Here, the Plaintiff alleges that the going-concern assets of Level Propane were directed to Horizon Propane by means of customer concealment and customer check concealment, Complaint at 26-29, leaving no going concern to reorganize under any plan, only purported causes of action to liquidate. The injury to the creditors and other parties in interest, left with payment of pennies on the dollar rather than the ability to do business with a reorganized enterprise is patent. No real distinction can possibly or plausibly be articulated between the conduct of the Debtors in *Tenn-Fla, supra*, who parked the offers to the detriment of creditors until *after* their fraudulent plan was confirmed, and the Debtors here who directed the assets to a participant in their scheme *before* the Plan was even proposed, so that no going concern was present in the estate for the benefit of any creditor. It is only the difference between before the plan and after the plan, with no difference in the intended outcome or in its achievement by fraudulent means with fraudulent intent.

The Defendant evades the necessary conclusion that the court in *Tenn-Fla Partners, supra*, demands the same honesty in all of the proceedings as the court in *Kostoglou, supra* articulated when he limited the test of a material fact set out in *Tenn-Fla Partners* to “information that is necessary to decide whether the elements prescribed for confirmation have been satisfied,” *In Re: Tenn-Fla Partners* 229 B.R. at 735. What the Defendant failed to cite was the court’s language setting out a much more expansive test:

“In order to confirm the proposed plan, the court must be able to make “an informed, independent judgment regarding each element of confirmation.” *In re Michelson*, 141 B.R. at 720. This court finds that information on TFP's failure to disclose the true interest in the property would be *material* to a determination on whether TFP's plan met the Code's disclosure requirements, was proposed in good faith, and on *whether TFP complied with its fiduciary duty as a debtor in possession*,” 229 B.R. at 735, emphasis supplied.

The Debtors in this case, at the time they proposed the plan, did so despite the frauds on this Court, having resisted and prevailed over the challenges to those frauds, with fraudulent intent. Proposing their plan in the face of those frauds could not have been in compliance with their fiduciary duty as Debtors-in-Possession. Were the Court to dismiss this Complaint in the face of this breach of their fiduciary duty, the Court would dismiss not on the basis that the Complaint's statement of a claim, but on the basis that it does not believe the allegations, a basis that is not available to the Court when deciding a Motion to Dismiss, *Lawler, supra, Nietzsche, supra*.

In conclusion, the Defendant is careful to suppress the distinction between proof and allegation. In so doing, the Defendant is appealing to the Court's disbelief of the allegations, a basis impermissible under R. 12(b)(6.) This suppression is essential to their argument since he is claiming that because the Plaintiff in his prior motion practice never proved his allegations, the allegations were without merit. Here, however, and for this purpose, the allegations set out in the complaint must be taken as true, whatever the state of the proof. Taken as true, the allegations set out a cause of action under 11 U.S.C. Sec. 1144, describing a fraudulent scheme to direct the going concern assets of the estate to a participant in the scheme, as a fraud on the court and to the detriment of all the remaining parties in the proceeding.

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THE DEBTORS FRAUDULENTLY CONCEALED THEIR INTENTION TO DIRECT THE GOING CONCERN ASSETS OF THE ESTATE TO A PRE-SELECTED PARTY TO THE DETRIMENT OF THE PLAINTIFF, THE CREDITORS AND OTHER PARTIES IN INTEREST.

The observation made by the court in condemning the conduct of the Debtors in *Tenn-Fla, supra*, applies equally to the Debtors whose plan is challenged here:

“The debtor can not argue legitimately that a chapter 11 trustee would have pursued such a course. As two commentators have observed:

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The duty of loyalty and good faith forbids directors and other business operators from using their positions of trust and control over the rights of other parties to further their own private interests, either by usurping opportunities, holding undisclosed conflicts or otherwise exploiting their positions. Raymond T. Nimmer & Richard B. Feinberg, Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees And Exclusivity, 6 BANKR. DEV. J. 1, 35 (1989).

The debtor misrepresented to the court at the confirmation hearing that it proposed its plan in good faith and that the debtor was in compliance with the Code's disclosure requirements," 170 BR at 968-969, emphasis supplied.

Here, the Debtors, controlled by the Bank Group, proposed a plan that advanced their interests at the expense of all the other parties to the bankruptcy, in that it gave the appearance of closure to a proceeding that they knew was unlawful from its inception and, as a consequence, misrepresented that they proposed their plan, designed to put the veil of legitimacy on their scheme, in good faith. In his Motion, the Defendant attempts to wrench the Plan out its context in order to purge the Debtors' conduct of the taint of fraud that has infected these entire proceedings.

The Plaintiff has alleged these proceedings were initiated for an unlawful purpose, Complaint at Paragraphs 18-20, maintained for an unlawful purpose and that frauds were maintained by those in control of the Debtors in order to deliver the assets of the estate to the hands their co-conspirators, Complaint at 22-26. That these misrepresentations were made are more than sufficient to establish that the plan was not proposed in good faith. It is clear from the unparsed language of all the cases that address whether a plan is proposed in good faith that the proceedings in which the plan is proposed must themselves be lawful, see e.g. *Kostoglou, supra*, *Coffee Cupboard, supra*, and that all of the conduct of the Debtors during the proceedings must be lawful, and while to Debtor is under the jurisdiction of this Court, who, as Debtors in

Possession under Chapter 11 of the Code are fiduciaries for all the creditors and others parties in interest, *In re Giguare* 165 B.R. 531, 534-535 (D.R.I., 1994).

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PLAINTIFF HAS STATED CLAIMS AS TO THE ORDERS MADE PRIOR TO THE CONFIRMATION OF THE PLAN

In his Complaint, the Plaintiff made the claims relating to the prior orders of this court well aware, and with the expectation, that these claims will rise or fall with his Complaint to Revoke the Confirmation of the Plan. The Defendant is well aware that the pleading form chosen, a complaint to enjoin enforcement a judgment is recognized by the Federal Rules in R. 60(d) which provides that “This [R.60, F.R.C.P.] rule does not limit a court's power to: (1) entertain *an independent action to relieve a party from a judgment, order, or proceeding,*” R. 60(d)(1), F.R.C.P., emphasis supplied, which is used when, for whatever reason, a Motion to Vacate Judgment is either unavailable or inappropriate. This means, an independent action, authorized by Court Rule, is the very means used in the Complaint.

The Defendant is well aware, further, that these additional counts were brought under the doctrine articulated in *United States v. Throckmorton* 98 U.S. 61, 67 (1878), the case articulating the doctrine recognized by R. 60(d), see also *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir., 1998). If the Confirmation is revoked, then these additional counts, which depend on the same fact pattern as the Complaint brought under 11 U.S.C. Sec 1144, can be expeditiously heard. If the Plaintiff in this case prevails, and revokes the Confirmation, the revocation will be because these bankruptcy proceedings were wholly infected by fraud, the same fraud by which each of these other Orders were procured. It would serve little purpose to bring these counts in a separate filing after the Confirmation is revoked and go through the same evidence as that which went to prove the revocation. These counts were included here solely for

the purpose of judicial economy, as the Defendant is well aware. His pleading, which evinces such disgust that the Plaintiff would bring so clumsy a pleading to court, is at best disingenuous. Such measured disgust is reserved by those who must defend the indefensible. If indeed the fraudulently procured confirmation of plan bars these actions at this moment, then this court is certainly capable of fashioning a remedy consistent with both justice and the plain facts.

CONCLUSION

In conclusion, for the reasons set forth above, the Plaintiff urges this Court to deny the Defendant's unfounded Motion to Dismiss. It is clear from the Defendant's argument that he would have this Court decide this not on the allegations, as a Motion to Dismiss must be decided, but on the basis of motions filed months and years before supported by that evidence not concealed in support of the overwhelming fraud that has affronted this Court. In short, the Defendant urges the Court to disbelieve the allegations and dismiss the Complaint on the basis of that disbelief, contrary to the requirements of R. 12 (b)(6.) This Plaintiff has made allegations cognizable as a cause of action under 11 U.S.C. Sec. 1144, and is entitled, at last, to his day in court with those rights to the machinery of justice accorded every other party.

Respectfully submitted,

/s/ David C. Eisler

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SERVICE

The foregoing has been filed electronically this 26th day of May, 2009. It is available to all parties who access the Court website. Parties may access this filing through the Court's system.

/s/David C. Eisler
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