

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

In Re:)
Level Propane, Gases, Inc., et. al.) Case No. 02-16172
)
) Ch. 11
)
) Hon. Randolph Baxter

**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.**

Now comes William H. Maloof, sole shareholder of the Debtors in the above-captioned case, by and through counsel undersigned and for his Motion to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings entered into June 11, 2002, pursuant to R. 60(b)(6), F.R.C.P, as incorporated by reference in the Rules of Bankruptcy Procedure, and for his Motion for Leave to Controvert the Involuntary Bankruptcy Petition filed June 6, 2002, pursuant to 11 U.S.C. Sec. 303, states as follows:

THE MOTIONS DESCRIBED

1.) The Motions made herein relate to the Agreed Order Converting the Involuntary Bankruptcy Petition under Chapter 7 to a Voluntary Petition under Chapter 11 and the original Involuntary Bankruptcy Petition itself. Your Movant prays this Court to vacate the Agreed Order on basis of fraud upon the Court, pursuant to R. 60(b)(6), F.R.C.P., in that at least two parties, the Bank Group and the Debtors, as a class, had no present intention at the time the Order was signed by them to “preserve and protect the

businesses and assets of Debtors' estates, prevent any further losses thereto . . . as going concerns for the benefit of their estates and creditors" and further their representation that the Chapter 7 Involuntary Bankruptcy Petition was filed in good faith. As a further basis to vacate the Agreed Order, the signature of your Movant was procured by fraud and coercion. Your Movant also prays for leave to controvert the Chapter 7 Involuntary Bankruptcy Petition, in that the Agreed Order tolled the answer date and that the Agreed Order should be vacated.

INCORPORATIONS BY REFERENCE AND ADDITIONAL EVIDENCE

2.) Your Movant incorporates by reference, for purposes of economy, the Exhibits in Volume A and the Transcripts in Volume B that constitute the evidence appended to the Examiner's report of June 6, 2003, Docket No. 1616. Further, your Movant incorporates by reference the Evidentiary Submissions filed in support of his Motion to Reopen Examiner's Report, filed January 31, 2006, Docket 2889, being Docket Nos. 2914, 2926, 2951 and 2952. Further, the Affidavit of Timothy Conklin and your Movant's statement under penalty of perjury is offered in additional support of these Motions, attached as Exhibits A.

The Parties and Their Agents

3.) Here follows a list of the parties and their agents, with a short description of their respective roles in the events outlined below:

William H. Maloof – the sole shareholder and director of Level Propane Gases, Inc. and its affiliated companies as well the sole shareholder and director of Park Place, Inc. and its affiliated companies.

Level Propane Gases, Inc. (Level Propane) – a retailer of residential, agricultural and commercial propane heating fuel with a business presence in 14 states, thrown into involuntary bankruptcy June, 2002.

Park Place, Inc. (Park Place) – a parking facility near Cleveland-Hopkins airport that served airline passengers, thrown into involuntary bankruptcy June, 2002.

Brian Salvagni – in-house counsel at Level Propane Gases, Inc.

Paul Dolansky – general manager of Level Propane Gases, Inc.

John Verbos – Chief Information Officer and later President of Level Propane Gases, Inc.

Walter Himmelman – pre-petition CFO of Level Propane and Park Place.

Jason Dimacchia – transportation manager at Level Propane Gases, Inc.

Timothy Conklin – transport fleet manager at Level Propane Gases, Inc.

Jared Maloof -- Secretary of Level Propane Gases, Inc. and Call Center/
Field Service Director, pre-petition.

Deutsche Bank – lead lender in the financing facility into which Level Propane and Park Place entered, pledging their assets as collateral.

Banker's Trust (BT) – Deutsche Bank's United States agent for financing facility. Banker's Trust was wholly-owned by Deutsche Bank.

The Bank Group – participants in the Deutsche Bank financing facility, which consisted of Deutsche Bank, LaSalle Bank and Provident Bank, with Banker's Trust as the agent for all three participants.

The Equipment Lessors – various parties holding leases on vehicles, such as trucks and busses, and other equipment, such as customer propane tanks, with Level Propane Gases, Inc. and Park Place, Inc.

Amerigas, L.P. – a competitor of Level Propane Gases, Inc. This entity ultimately purchased all the assets of Level Propane Gases, Inc. from Eaglerock Propane LLC.

FerrellGas – a competitor of Level Propane Gases, Inc., who had communicated written good-faith offers to purchase Level in 2001 and 2002

Star Gas, Inc. – a competitor of Level Propane Gases, Inc., which had also communicated a written good-faith offer to purchase Level in 2002, which offer was actively negotiated through May, 2002.

John Rudd – a principal of Newmarket Partners, a business management concern whose focus is business restructuring, put in place at the insistence of the Bank Group as the Chief Restructuring Officer (CRO) of Level Propane Gases, Inc.

Blair & Co. – an investment firm, headquartered in Chicago, engaged to find a suitable buyer for Level Propane Gases, Inc. and to complete the sale in the event that a suitable buyer is found.

Squires, Saunders & Dempsey (SS&D) – prominent Cleveland law firm which had represented William Maloof's businesses since the establishment of Park Place.

Benesch, Friedlander, Coplan and Aronoff (BFCA) – a business law firm, engaged by William H. Maloof, acting for Level Propane Gases, Inc., to represent the businesses in a Ch. 11 reorganization.

Mark Schlachet – an attorney-at-law specializing in business reorganizations, of counsel with BFCA.

H. Jeffrey Schwartz – an attorney-at-law specializing in business reorganization, a partner at BFCA.

William Shonberg – an attorney-at-law, a partner at BFCA.

James Hill – an attorney-at-law, the managing partner at BFCA.

Michael Primrose – an attorney-at-law, a partner at BFCA.

Michael Mayo – an attorney-at-law, employee of BFCA, who represented Deutsche Bank.

Greg Gale – an attorney-at-law, employed by BFCA.

Mario Fazio – an attorney-at-law, employee of BFCA, who represented Plaintiff with respect to his personal federal tax dispute, directly related to his guarantor status to the financing facility.

Charles Sweet – installed as Director of Level Propane Gases, Inc. and Park Place, Inc. June 6, 2002, when the Bank Group seized the shareholder voting rights of both corporations from William H. Maloof.

Stephen Sues – hired by Charles Sweet as CEO of Level Propane Gases, Inc.

Paul Lowe – hired by Charles Sweet to manage the finances of Level Propane Gases, Inc.

Eaglerock Propane, LLC – an entity formed by Richard Jacobs that entered into a management agreement with Level Propane Gases, Inc. as Debtor-in-Possession and then purchased the assets of Level Propane Gases, Inc.

Robert Angart – an Eaglerock employee who acted as CFO of Level Propane Gases, Inc.

Richard Anter – at various times, President of Level Propane Gases, Inc., and at others its Director of Human Resources and Legal.

The Examiner – G. Ray Warner, who examined the affairs of Level Propane Gases, Inc. as Debtor-in-Possession and pre-petition pursuant to Bankruptcy Court orders of April 14, 2003 and April 30, 2003.

STATEMENT OF THE FACTS

Deutsche Bank's New Customer

4.) In 1999, Deutsche Bank entered a financing facility with Level Propane and Park Place, replacing National City Bank, who had expressed a desire to end its relationship with Level Propane and Park Place. The original participants of the financing facility were Deutsche Bank, the largest bank in the world, and its agent, Banker's Trust. Deutsche Bank later brought in LaSalle Bank, a division of ABN Ambro, a huge Dutch banking and financial concern, and Provident Bank, which later became a division of National City Bank, as participants, forming the Bank Group. Unbeknownst to William Maloof, the participation of Provident Bank in the facility created a conflict of interest for his long-time law firm, Squire, Saunders and Dempsey.

The Relationship Sours

5.) In January, 2001, the Ohio Attorney General filed suit against Level Propane, alleging unlawful pricing practices related to the fees associated with propane service, *State of Ohio, ex. Rel. Betty D. Montgomery, Attorney General of Ohio vs. Level Propane Gases, Inc.*, Case No. 01-CVH-01-018, Delaware County Court of Common Pleas. Suits by other State Attorneys General quickly followed. Level was soon defending pricing practices complaints in almost all the states in which it did business.

6.) Squire, Saunders and Dempsey had drafted the customer contracts that gave rise to these pricing practices suits. Kenneth Seminatore, representing Level Propane, later brought a malpractice claim against SS&D on this basis.

7.) As an apparent result of the state pricing practices suits, Level Propane's relationship with the Bank Group deteriorated to the point that threatened defaults were negotiated out. Representatives of the Bank Group would contact only Walter Himmelman, then CFO, refusing contact with William Maloof. When Mr. Maloof sought advice from George Barry at Squire, Saunders & Dempsey, which had represented his businesses for 20 years, regarding avenues for resolution of these disputes with the Bank Group, among which included reorganization under bankruptcy protection. Only then did Mr. Barry disclose SS&D's conflict of interest, because the Bank Group refused to permit SS&D to represent Level Propane on the loan. He advised Mr. Maloof to obtain a waiver of the conflict from Provident. When Mr. Maloof approached Ted Randall of Provident for the waiver, Mr. Randall refused. After listing and rejecting several firms on the basis of conflict, Mr. Randall referred Mr. Maloof to McDonald, Hopkins, another

Cleveland law firm, assuring Mr. Maloof that McDonald, Hopkins of all of the firms had no conflict.

8.) In order to separate Park Place from the Bank Group financing facility, Bank One committed \$15 MM in May, 2001. It renewed its offer five times between May, 2001, and February, 2002, but in each instance, the Bank Group refused to let Park Place out its financing facility.

9.) In June, 2001, Ferrell Gas offered to purchase Level Propane for its debt, leaving Mr. Maloof with Park Place, the propane bulk transport fleet and an existing operation in Florida free and clear of debt. Mr. Maloof held off the offer, believing that once the consumer pricing suits were resolved, Level Propane would command a higher price. Nevertheless, he communicated this offer to the Bank Group.

The Bank Group Positions Itself for Control

10.) In October, 2001, Level Propane retained McDonald, Hopkins to prepare Ch. 11 bankruptcy filings. After continuous prodding, Sean Riley of the firm advised Level Propane that his firm cannot even prepare the first day papers, since the firm represents the very banks which would be the largest creditors in any contemplated bankruptcy.

11.) Kenneth Seminatore, aware of Level Propane's need for counsel, introduced Mr. Maloof to Mark Schlachet, a well known bankruptcy attorney affiliated with Benesch, Friedlander, Coplan and Aronoff (BFCA), November 1, 2001. After Mr. Schlachet ran a conflicts check run which disclosed no conflicts (which included, at Plaintiff's insistence, a determination that BFCA had never represented any of the Defendant banks), Level Propane paid an initial retainer and BFCA began work on the proposed Ch. 11 filings at the end of November, 2001.

12.) Offers to purchase Level Propane remained open from various parties, among which was an offer from Star Gas for \$165MM (which provided for carve-outs of his lucrative national propane transport operation and the valuable right to operate in the Florida residential retail market while leaving Mr. Maloof with ownership of Park Place, free and clear). At William Blair & Co.'s suggestion, the deal was struck at the BFCA offices, with the Star Gas CEO, the Star Gas President and the Star Gas Chief Legal Counsel present, representatives of Blair and countless BFCA lawyers in attendance. This dramatic event provided a pretext for James Hill, the managing partner at BFCA, to involve himself in the file. Starting in December, 2001, Mr. Hill began a campaign that ultimately wrested control of the file from Mr. Schlachet by the end of January, 2002. *In February, 2002, Mr. Hill engaged BFCA in representation of Mr. Maloof with respect to his income tax matter that related directly to his liability as guarantor of the financing facility with the Bank Group.* If the tax dispute over Mr. Maloof's tax basis in certain property of Level Propane's resolved in his favor, his obligations as Guarantor of the Bank Notes would be extinguished.

13.) By March 1, 2002, BFCA represented Level Propane *only as to a proposed sale*, to which a Ch. 11 filing was an adjunct, and later made it a subfile of the corporate sale engagement. Later that month, by letter dated March 19, 2002, Mario Fazio of BFCA advised Mr. Maloof of his efforts with the IRS relating to his tax matter.

14.) In contemplation of a possible Ch. 11 filing, Grant-Thornton, an investment advisor, prepared a valuation of the companies that set their value, exclusive of Park Place, and without valuation of the computer technology, at no less than \$125MM, in

March, 2002. Shortly thereafter, Parthenon Capital made a written offer for Level Propane of \$129MM, in competition with the Star Gas offer.

The Bank Group Takes Control

15.) At the insistence of the Bank Group, memorialized in the Forbearance Agreement of March 7, 2002, John Rudd of Newmarket Partners, was engaged as the Chief Restructuring Officer (CRO) of Level Propane, the first week of March, 2002. The Forbearance Agreement all but severed Level Propane from its Principal, and further insisted that as a condition of its forbearance the Company be sold by a date certain to Parthenon Capital. Thus at the moment of its execution, Mr. Maloof was given the choice between surrendering Level Propane to the Bank Group in hopes of realizing some proceeds on its sale, or losing all hope of realizing any value from his equity in Level Propane as the Bank Group seized it for liquidation. The Forbearance Agreement and the retention of Newmarket were both foisted on Level Propane and Mr. Maloof in order to wrest control utterly from him, as Level Propane's Principal, to the Bank Group. At the moment the Forbearance Agreement was signed, Level Propane lost its independence altogether and became alter ego of the Bank Group. Mr. Hill's ardent pursuit of the corporate representation of Level Propane to the exclusion of Ch. 11 representation transformed BFCA from an independent counsel to a pliable instrument of the Bank Group.

16.) Having wrested control of the Level Propane file from Mr. Schlachet, the ultimate evidence of which was the Forbearance Agreement, which made a sale a term of Level Propane's survival and precluded a Ch. 11 Bankruptcy by making it an exercise in

futility, Mr. Hill proceeded to march to the Bank Group's drum with respect to managing the legal affairs of BFCA's nominal clients, Level Propane and Park Place.

17.) Among the first acts of Mr. Rudd was to cease payments to Level Propane's equipment lessors, which totaled nearly \$1,000,000.00 per month, thereby throwing the leases of trucks, customer tanks and other equipment into default. At the point that Mr. Rudd ceased the payments, little more than principal was due on the leases, the bulk of which principal would have been paid down within 24 months of the time the payments were stopped. Level Propane agreed to indemnify Newmarket and Rudd for any act short of fraud. Mr. Rudd and Newmarket Partners were to execute and deliver a confidentiality agreement in Level Propane's simultaneously with these other agreements, but did so only within days of his resignation as CRO some weeks later.

18.) Throughout this period, BFCA continued to prepare and present drafts of the proposed sale agreements with Star Gas. Meanwhile, Level Propane continued independently to negotiate with the various states until before Spring, 2002, the suits were resolved by agreements for Assured Voluntary Compliance (AVC), and substantially paid off. The agreement for Assured Voluntary Compliance with West Virginia was in the final stages of negotiation. Level Propane was prepared to enter these agreements because its centrally administered computer system gave it the unique ability in the industry to comply with the timely notice requirements of the AVCs on an automated basis, which otherwise would have been administratively impossible. Thus Level Propane had *negotiated in the AVCs an amplification of its competitive advantage* which should have increased its going-concern value.

19.) Mr. Maloof was introduced to Richard Baumgart by Mark Schlachet, shortly after the Forbearance Agreement was executed, with the purpose of Mr. Baumgart filing a Ch. 13 personal bankruptcy for Mr. Maloof simultaneously with that of the companies' Ch.11 petition. As Mr. Maloof was contemplating a personal bankruptcy, the Chief Restructuring Officer of Level Propane, John Rudd, killed the cash flow at Level Propane. Meanwhile, the deal with Star Gas was permitted to stall.

A March to the Gallows

20.) Mr. Rudd's position as Chief Restructuring Officer was further strengthened in Blair & Co.'s letter of May 10, 2002 to John Verbos, then President of Level Propane, in which Blair & Co. specifically agreed to "assist John Rudd in his capacity as Chief Restructuring Officer in . . . developing a strategy for pursuing a Possible Transaction and a list of possible participant. . . and contacting and eliciting interest from those possible participants." No action would be taken by Blair without Mr. Rudd's participation, and any communication made directly to Blair by either a Board member or a Shareholder regarding sale of Level Propane, Blair would communicate to Mr. Rudd.

21.) Newmarket Partners continued their efforts to wreck the going concern value of Level Propane into the days just before the Bankruptcy, when Patty Geitgey, a Newmarket manager under Rudd, directed Timothy Conklin, Level's Transportation Manager, to pull no more than 25 loads/week from the various propane supply points with which Level Propane had contractual relations. The effect of this order to Mr. Conklin was to cut off pipeline allocation for the 2002-2003 heating season. Mr. Conklin, cognizant of the devastating impact such a course would have of the company's winter

product supplies, protested that her decision would be disastrous. For his challenge to this direction, Conklin was terminated later that week. After Level Propane was put into bankruptcy, the management abandoned even this minimal contact with the pipelines, so that no allocation was earned whatsoever. Further, management gave up 20 million gallons in allocation previously negotiated, of which 10 million gallons were optioned to be hedged at low prices for pennies on the gallon. Instead, management opted to buy off-spec refinery gas, contrary to established Level Propane Gases, Inc. practice and policy.

22.) At the same time that Level Propane winter product supply was choked off by Ms. Geitgey, Mr. Maloof learned of the renewed Ferrell Gas offer for the company, which would give him \$165MM cash and carved out the transport fleet operation and the state of Florida for Mr. Maloof to retain as his own enterprise. The principal of Ferrell Gas, James Ferrell, contacted Mr. Maloof only after his attempts to communicate his offer to Blair & Co. and to John Rudd as CRO fell on deaf ears. Neither Rudd nor Blair & Co. responded to his offer, when both of whom had the authority to act on it, and which, had they done so, would have discharged the entire debt of the Company to the Bank Group. When Rudd left Level, Mr. Maloof believed the Ferrell Gas deal had already been communicated to the Bank Group, and justifiably relied on its going forward, since, by the terms proposed, the purchase would fund almost double the Bank Group's loan exposure.

Involuntary Bankruptcy

23.) Mr. Maloof could not have monitored the responses of Newmarket or Blair & Co. to the Ferrell Gas offer because he was absorbed in a crisis with his own counsel,

BFCA. In the days preceding the filing of the Involuntary Ch. 7 Petition, Mr. Maloof and BFCA had a sharp disagreement concerning whether Level Propane could properly sell pre-buys as it had customarily, and which was a common industry practice. Mr. Maloof stood on prior practice, BFCA contended that as a wounded business Level Propane could not sell pre-buys since it could offer no assurance that it would be in business to deliver on the contracts. On June 5, 2002, he repeatedly requested the First Day papers for the Ch. 11 BFCA had prepared. Yet BFCA held him off until June 6, 2002, going so far as to leave his son Jared, an officer of Level Propane, to beg in their lobby for the First Day papers on June 6, 2002, while the Bank Group filed the Involuntary Ch. 7 Petition, seized the voting rights, and installed Charles Sweet as sole director as Jared waited in the BFCA lobby. Only after all of this was done, did Mr. Primrose appear in the lobby to sorrowfully announce to Jared that all of this had transpired. BFCA terminated its representation with Level Propane that same day, on the pretext of the pre-buy disagreement. With the Ch. 7 filed, the Ferrell Gas offer was derailed. The plain purpose of the Ch. 7 was to derail purchase offers that would have left Maloof with resources to participate in the propane market in any capacity.

24.) On June 11, 2002, negotiations began to convert the proceedings into a Ch. 11 Reorganization. At this point, the Debtor and its Counsel, BFCA, whom Charles Sweet, the newly elected Sole Director of Level Propane, had hired the day the Involuntary Petition was filed, were entirely creatures of the Bank Group. The only party with an interest adverse to the Bank Group that signed was Mr. Maloof, who signed it as a result of fraud and coercion. Mr. Maloof stipulated to the conversion to Chapter 11 on the specific conditions that 1) BFCA would not be counsel for the Debtors, 2) that neither

John Rudd nor Newmarket Partners would have any part in the administration of the Debtors' affairs 3) that DSI would be appointed to manage the affairs of the Debtors pending the sale of the Debtors to one of several ready, willing and able suitors, and 4) that he be provided with weekly financial statements. These promises were not only specifically broken, *there was no present intention by the Bank Group, which controlled both BFCA and the Debtors, to abide by any of these conditions upon which Mr. Maloof specifically relied when he stipulated to the Conversion.* Charles Sweet, in his statement to the Examiner, claims that BFCA was only transitional counsel and only after failing to secure any other counsel capable on the one hand, and not barred by conflict on the other, did he seek to place BFCA permanently as Debtor's counsel. Moreover, were Mr. Maloof refuse to stipulate to the Conversion, a Trustee would be appointed, who would all but certainly liquidate the company, since he would be unwilling to operate it through the heating season. Once again, faced with the choice between hope for survival of Level, even if it went into other hands, and utter ruin, Mr. Maloof had no choice but the stipulate the conversion.

The Bank Group's Iron Grip

25.) That the Bank Group had no present intention to abide by any of these conditions was born out by subsequent events. Among these events was BFCA's inducement of Mr. Maloof to drop his appeal of the bench appointment as counsel for the Debtor on the representation that Level Propane urgently needed his managerial participation to survive and that his appeal would be inconsistent with assuming such a

role. The moment he dismissed his appeal, Mr. Maloof's position with Level Propane evaporated.

26.) That the Bank Group intended to control the administration of the Bankruptcy Estate was born out by its utter domination of the September 23, 2002 auction of Level Propane, particularly in its decision to forgo a stalking horse bidder in the auction process. It is further born out by the fact that no attempt was made to reactivate the bids of Star Gas or Ferrell Gas. Both of these pre-petition bids would likely have paid off the Bank Group altogether, or at the very least put the resources of very much larger, publicly traded, entities at work to pay off the debt. Its domination is further born out by its consent to Eagle Rock Propane's management of Level Propane, after Eagle Rock had made and withdrawn a bid at the September 23d auction. The Bank Group could well afford to phony up an auction because one of the primary objects of its bad-faith Involuntary Bankruptcy Petition was achieved by its very filing: the AVCs (see Paragraph 21) were made into dead letters, and the status quo of the industry was thereby preserved. Neither Star Gas nor Ferrell Gas were pressed by any longer by the urgency to purchase such technology once the AVCs were taken off the competitive field, thereby muffling down Level Propane's competitive advantage arising from its satellite computer system.

27.) That the Bank Group dominated BFCA throughout the administration of the Ch. 11 proceeding is born out by the contest over the equipment leases, in the Debtor sought to recharacterize as disguised financing agreements, and which effort provoked a complaint for Equitable Subordination, based on the very domination of Level Propane here alleged.

28.) The Bank Group in like manner dominated those charged with administration of the Debtor in Possession. One of the very first acts of Steven Sues, the newly appointed Chief Executive Officer of the Debtor in Possession was to disable the audio tape system at the Westlake Headquarters and to seize the pre-petition tapes that, among other matters, contained the records of Mr. Maloof's negotiations respecting the Ferrell Gas offer for the company and his unsuccessful struggle to obtain the First Day Papers so that a pre-emptive Chapter 11 filing could be made. Had Mr. Maloof been left alone to complete the Ferrell Gas deal or had he won the struggle to file a voluntary petition, Level Propane would exist today as a going concern. In a parallel action, Mr. Sues disabled the video recording system at the Westlake headquarters, so that no record of any document spoliation and shredding would be made.

The Pillage of Level Propane

29.) Because of the massive shredding and spoliation of documents at Level Propane Headquarters since the inception of the Ch. 11, at which point the Bank Group had complete control over the affairs of the Debtor in Possession, there could be no documentary certainty whatever of the events that transpired leading up to the Bank Group's utter domination of the Debtor. The most celebrated incident of spoliation took place in March, 2003, when Robert Angart disposed of financial and insurance records, customer records and bank emails, which were ultimately recovered from waste containers and sequestered for an inventory that Brian Salvagni began but never completed because he was placed on administrative leave. The lengths taken to control the fallout from this disposal were nothing short of Herculean: Brian Salvagni, General

Counsel for the Debtor-in-Possession was placed on administrative leave, ultimately to leave the employ of the Debtor-in-Possession, and Richard Anter, President of the Debtor-in-Possession, resigned; all over what management claimed were some mere duplicates of financial papers.)

30.) The campaign to destroy the documentation of the Debtor-in-Possession began well before the Angart incident and continued after it. In December, 2002, Pat Tighe observed this same Mr. Angart disposing of massive quantities of records; in February, 2003, Paul Lowe, an administrator associated with Eagle Rock management, was observed shredding documents; on yet another occasion, the contents of large binders of customer tank records were shredded; and throughout the tenure of Eagle Rock as manager, prior to its purchase of Level Propane's assets, those running the concern were constant visitors to the shredding machine at the Westlake headquarters from the day they took control through 2003.

31.) Not to be outdone by the outrages at the headquarters of Level Propane, the men in field also participated in the wholesale spiriting away of physical assets with a view toward making asset value unascertainable by making a hash of the tank serial-number data base that correlated customers to their tanks: not only were customer tanks taken from the various plants by the truck-load for sale by a second-hand vendor on at least four (4) separate occasions between June and August, 2002, but men in the field were authorized to sell customer tanks throughout the winter heating season of 2002-2003 (December, 2002 – February, 2003) to whomever they could manage at whatever price they could get, so long as a cash payment of \$75 per tank made its way into the hands of management. These novel practices were capped by the bizarre events of April,

2003, in which a work order was issued to the field managers to purchase quantities of “Amerigas White” paint, to be mixed by Sherwin-Williams especially for the project, and to paint the 30,000 gallon storage tanks at each plant this Amerigas White over the pale gray identified with Level Propane. This work order was issued even before assets of the Debtor were in the hands of Eagle Rock as purchaser. The effect of all of these actions by the Bank Group was to make it impossible to identify the customer tanks with particular leases, and to further obliterate the identity of Level Propane as going concern on the ground.

32.) In the midst of all these machinations, the Equipment Lessors, recognizing the Bank Group’s domination of Level Propane and BFCA for what it was, filed a Complaint for Equitable Subordination in January, 2003. In their complaint, they described how Level Propane had been turned into the Bank Group’s alter ego and how the conduct of Level Propane, as Debtor-in-Possession, was wholly controlled by the Bank Group for its, the Bank Group’s, sole benefit.

33.) While the spoliation of documents and the spiriting away of tanks were moving inexorably forward, delivery of gas to customers ground to a chilly and miserable halt. Management’s prevailing failure to fill customer-owned tanks only served to slash the Debtor-in-Possession’s customer base, thereby slashing the Debtor-in-Possession’s calculable value. Timothy Conklin’s prediction that absent allocation Level would face a supply crisis was borne out when plants in throughout the company system ran out of gas and some customers went without heat for days during a record-breaking cold snap, as the result of management’s decision to abandon the partial-fill policy that kept customers with critical supply until demand fell off and pipeline allocation ended for the season.

The futile establishment of a “rail supply terminal,” consisting of little more than a pumper truck at a rail siding, after the crisis had come and gone was yet another empty gesture by the Debtor-in-Possession’s management to disguise the *clear pattern of enterprise destruction* in which it had engaged from its initial involvement.

The Bank Group’s Pillage Revealed, then Covered Up

34.) Mr. Maloof’s efforts to bring the document spoliation to the Court’s attention in his Emergency Motion for Appointment of Examiner of March 11, 2003, were frustrated by the false assurance that the spoliation was investigated by disinterested counsel. Counsel brought forward in Court to offer this assurance was none other than Peter Kirsanow, who, proclaiming his disinterestedness, pledged to conduct a thorough and objective investigation into the Angart incident. As matters unfolded, Mr. Kirsanow’s disinterestedness was put to the lie when, in his investigation he bullied a witness to remain silent, and he appeared on behalf of the Debtor-in-Possession before the New Mexico Labor Board, to contest the claim of a terminated employee. Mr. Kirsanow was joined in this appearance by Richard Anter, who, having resigned as President of Level (or Horizon? We know not which.) in March to become Director of Legal and Human Resources, reappears as President in May.

The Bank Group’s Panic Saves the Day

35.) Despite the misrepresentations made directly to the Court, an Examiner was appointed on April 14, 2003, on the motion of the United States Trustee. The Trustee’s motion had been made in response to the pleading submitted by Mark Schlachet in which he recounted, among other matters, the domination of BFCA by the Bank Group. The

scope of the Examiner's duties were not set out in the Order, but, rather, reserved. The very next day, April 15, 2003, the Debtor files its proposed Reorganization Plan. Three calendar days later, April 18, 2003, the Bank Group submits to Court its unequivocal support for the Reorganization as proposed. Ten (10) calendar days later, April 28, 2003, a Global Settlement was submitted for the Court's approval. The Equipment Lessors were dragged into this settlement, with an apparent promise of almost 50% of the sale proceeds, against the prospect, made painfully apparent throughout the winter, of their assets on the ground vanishing before their eyes as they sought to prove their claims against the Bank Group. The proposed Global Settlement was followed the next day, April 29, 2003, by a Motion for Sale of Level Assets to Eagle Rock. The same day, the Bank Group files with the Court its comments regarding the scope of the Examiner's duties – stating that his budget should not exceed \$35,000 and that the scope of his investigation, both as to issues and as to time allotted to the investigation, should be severely limited in view of the proposed Global Settlement and the Motion for Sale. Since these events would resolve the disposition of any pending disputes and further the largest asset would be sold, there seemed no purpose in raking up old coals.

36.) On April 30, 2003, the order setting out the scope of the Examiner's duties was issued. The examiner would address only the issues bearing on the propriety of BFCA's conduct in relation to the bankruptcy, both pre- and post-petition, and address additionally the allegation that Robert Angart attempted to wrongfully dispose of corporate records. The report was to be filed June 6, 2003. In the report, the Examiner made it clear that his scope was extremely narrow and that his conclusions were necessarily curtailed by the severely limited time frame in which he was required to

investigate and report on the issues. Shortly thereafter, the Global Settlement was approved by the Court.

37.) In July, 2003, the tank inventory was completed. and the Sale of Assets was closed. Eagle Rock later sold the assets to Amerigas, who stated to the trade press that it was unable to determine with any assurance how many customers came with the former Level Propane. Some three years later, in May, 2006 at Level's former headquarters in Westlake, Amerigas unveiled the computer dispatch system that it had obtained with the purchase of the Level assets to its hundreds of plant managers.

LAW AND ARGUMENT

-1-

The Agreed Final Order and Stipulation Converting Cases from Chapter 7 to Voluntary Cases Under Chapter 11 Dated June 11, 2002 is Void as a Fraud Upon the Court

38.) The Stipulated Order of June 11, 2002, by which the Involuntary Chapter 7 Proceeding was converted to a Chapter 11 Reorganization was fatally poisoned by the species of fraud that subjects it to a Motion to Vacate pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure. The standard to vacate an order of this kind is indeed stringent, but has been met in the exceptional instance, c.f. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); *Toscano v. C. I. R.* 441 F. 2d 930 (9th Cir.1971). Here, the fraud depended on the conduct of three parties: The Bank Group, its alter egos, the Debtors, and, acting under duress and subjected to false assurances to induce him to act against his interest, your Movant.

39.) The parties stipulated that "Orders for relief in the above-captioned involuntary chapter 7 cases are hereby granted." This linchpin statement holds within it

the entire fraud: for no relief can be granted when the Involuntary Petition for Relief under Chapter 7 of the Bankruptcy Code was made in bad faith. When the representatives for the Bank Group and Level Propane stipulated to the Involuntary Petition, they did so with the present knowledge that the Petition was unlawful and, were the right to controvert it not cut off, such a controversion of the Involuntary Petition would be successful. Moreover, the Agreed Order recited that the parties entered into discussions after the filing of the Involuntary Petition to resolve the disputes occasioned thereby “in a manner that will preserve and protect the businesses and assets of Debtors’ estates, prevent any further losses thereto, and maximize the value of the Debtors as going concerns for the benefit of their estates and creditors.” (Stipulations at Paragraph 7).

40.) The Bank Group stipulated to this language with the present intention, which intention was demonstrated by subsequent events and could be readily anticipated from their pre-petition conduct, of stripping Level Propane of all its physical assets and all its customers so that all that remained of the going concern was its satellite delivery system. Level Propane, as the alter ego of the Bank Group since no later than March 7, 2002, stipulated to this language with the present knowledge of the Bank Group’s plans for its future. Only your Movant had no idea what was in store for Level Propane: at that moment he signed the Agreed Order he believed that it was the only hope of realizing the value on the enterprise and, further, he believed that the value would be realized by a sale of Level Propane intact to a third party. So positioned, Mr. Maloof signature was procured “ “by means of an wrongful threat precluding the exercise of free will’ ” *First National Bank v. Pepper* 454 F.2d 626 (2d Cir., 1972) at 633, quoting *Austin Instrument Co. v. Loral Corp.* 29 NY 2d 124, 130, 324 NYS 2d 22, 25, 272 NE 2d 533, 535 (1971),

see also *Citibank, N.A. v. Real Coffee Trading Co., N.V., et. al.* 566 F. Supp. 1158 (S.D.N.Y., 1983), which offers an instructive parallel to Mr. Maloof's protests and opposition to the terms of the Agreed Order as it actually played out.

41.) The relationship among the parties to this Agreed Order is comparable to that in *United States v. Denham* 817 F.2d 1307 (8th Cir, 1987), in which record counsel for Denhams in a bankruptcy proceeding dealt on his own account to the detriment of the Denhams, thereby forcing them to stipulate to an Order that would, if not challenged, cost them their residence. The Denhams moved that the stipulated order be vacated, arguing that they entered into it because their counsel had abandoned their cause to pursue his own interests long before, see at 1309. Observing that the attorney's abandonment of the Denhams was of the fraud asserted, the Court remanded the cause for trial on the merits, at 1310. Here, Mr. Maloof was altogether isolated at the June 11, 2002 negotiations – having been abandoned by BFCA just days before on the thin pretext of a pre-buy dispute – and the corporations of which he was the sole shareholder were acting as the alter egos of the Bank Group, not just since the claimed election of Charles Sweet, but from at least March 7, 2002, when the Forbearance Agreement, which he signed on the threat of liquidation, put control of all the funds and all the decision-making in the hands of the Bank Group. That BFCA had actually worked for the Bank Group since March 7, 2002, could not be more plainly stated than by James Hill, its managing partner:

“That with John Rudd in there and obviously the banks approving the payments, again that's key. The banks have to approve these payments. That it was agreed we would be paid on a weekly basis.” Hill Statement to Examiner at 94 (Exhibits Vol. B No. 4)

42.) That the corporations had no independent will after March 7, 2002, is born out by the terms of the Forbearance in which states that the Lenders agree “to forbear on

a daily basis in the exercise of their sole and absolute discretion” upon the occurrence of any of fifteen (15) events of which the Lenders were, by the terms of the Agreement only judge. This utter lack of independence has been observed elsewhere in these proceedings, specifically in the Complaint for Equitable Subordination filed by Equipment Lessors on January 10, 2003.

43.) Thus, as the terms of the Agreed Order were formulated, at least two parties had *no present intention to abide by its terms*, that is, the Bank Group and Debtors, the Bank Group’s alter egos. The only party with an actual interest in the continued going-concern existence of the Debtors, Mr. Maloof, stood alone, abandoned by counsel who had, despite written and oral assurances to the contrary, abandoned him long before for the Bank Group.

44.) The events immediately preceding the filing of the Involuntary Bankruptcy are vital to an appreciation of Mr. Maloof’s position: until June 6, 2002, he believed, in good faith, that BFCA represented Level Propane and the other companies of which he was the sole shareholder and that BFCA represented these entities independently of the Bank Group. Indeed, he believed in good faith, having been told by his own counsel, that the only reason for the Forbearance Agreement was to buy breathing room for the completion of the Star Gas purchase, which within days of the Involuntary Bankruptcy was, as far as he could determine, being actively pursued, by, as he believed in good faith, counsel working in his interest. Until June 6, 2002, he still had every reason to believe that BFCA continued to represent him regarding his personal tax matter, which, though personal, bore directly on his liability as Guarantor of the Bank Group financing facility.

45.) Thus, when he faced a hostile room on June 11, 2002, he had lost his counsel within days, had just seen his enterprises thrown into involuntary bankruptcy and just seen his shares voted to install a complete stranger, Charles Sweet, as Sole Director of all the entities. He had no counsel with a knowledge of the case to whom he could turn, Richard Baumgart having become involved only a few days before that day, he was utterly without resources to mount any sort of opposition to the plans that the Bank Group had for the going concerns, and, he still believed, in good faith, that offers to purchase Level Propane were still pending and the Bankruptcy might be an arena in which the situation could be stabilized to complete one or the other of these sales. As subsequent events bore out, none of this was to be the case. Just as in *Denham, supra*, and in *Real Coffee Trading, supra*, Mr. Maloof had no choice but to sign off on the Agreed Order to preserve his enterprises. At the time he signed the Agreed Order your Movant did not know, *nor could he have known* that the other parties to the agreement, the Bank Group and, their alter egos, *had no present intention* of seeing the enterprises survive as going concerns. Later events, including the deliberate frustration of the September 23, 2002 auction by the Bank Group, which decided that no stalking horse bidder would be designated, and the inexplicable failure of BFCA to provide wiring instructions for the bidders, bear this out. This is further born out by the conduct in the field: a massive sell-off of customer tanks outside of the authority of the Court, inexplicable failures in gas deliveries, and the bizarre work order to paint all the 30,000 gallon storage tanks “Amerigas White.”

46.) What further bears this out is the continuing efforts to cover up their wrongdoing, prompting Complaint for Equitable Subordination, Mark Schlachet’s cross-claim

under seal, and the Examiner's investigation. The Bank Group finally succeeded in buttoning down the cover-up, for the moment, with the Global Settlement and the Sale of Assets in June, 2003.

47.) As your Movant has stated in earlier pleadings, he is before you, pursuing this Motion, only as the result of a chance remark Pat Tighe, his former safety director at Level Propane, that he saw document spoliation in December, 2002. The Angart incident of March, 2003, at that moment, ceased to be an isolated incident, but part of a pattern, which has been put before this Court in your Movant's recent pleadings.

48.) The scale, gravity and depth of the fraud in which the Bank Group actively engaged throughout the entire life of this Estate, its otherwise inexplicable conduct to the detriment of the going-concern value of the enterprises, both pre-petition and post-petition, amply demonstrate that at the time they entered the Agreed Order and had their alter egos enter the Agreed Order, they had no present intention to "preserve and protect the businesses and assets of Debtors' estates, prevent any further losses thereto . . . as going concerns for the benefit of their estates and creditors" and further at the time they stipulated that the Order for Involuntary Relief under Chapter 7 are granted, they knew, and *knew that they were solely in position to know*, that the Petition for Involuntary Bankruptcy was made in bad faith and for a bad faith purpose. Such conduct is "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas, supra*, at 246. In other words, the conduct of the Bank Group, in filing an Involuntary Petition against entities that were its alter egos pre-petition with the purpose, born out by conduct during the administration of the Estate, and the cover-up of that

conduct, to destroy Level Propane as a going concern, is a bold and shameless affront to this Court. This Court has the inherent power and the duty to itself to address this affront to the integrity of its judicial process by vacating the Agreed Order, *Hazel-Atlas, supra*.

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Movant Has the Right to Controvert the Involuntary Petition Pursuant to 11 USC Sec. 303

49.) In the absence of the Agreed Order, this Estate reverts to its prior status as a newly filed involuntary petition, which provides, in Paragraph (d) of Sec. 303 that the Debtor may answer the petition and that, if it proves that the Involuntary Petition was filed in bad faith, the Debtor is entitled to damages proximately caused by such filing or punitive damages, Paragraph (i). Here, your Movant is entitled to answer on behalf of the Debtor having established that the putative Debtors were in fact, for months prior to the filing of the Involuntary Petition, alter egos of the Bank Group. *The lapse of nearly four years is tolled by the Agreed Order of June 11, 2002, which proving to be bottomed on a fraud, starts the answer time running anew.* While the remedy of controversion is seldom used, those controverting Involuntary Petitions have prevailed in bad faith claims where, for among other reasons, the petitioner has used the involuntary filing to protect their interest to the disadvantage of other creditors, *In re Schloss* 262 B.R. 111 (Bankr., M. D. Fla., 2000), for revenge, *In re Delorean & Delorean Cadillac, Inc.* 265 B. R. 574 (Bankr. N.D. Ohio 2001), use of the Bankruptcy Court to resolve a two-party dispute, *In re Ballato* 252 B. R. 553 (Bankr. M.D. Fla. 2000). The pattern of outrages perpetrated by the Bank Group clearly demonstrates that the Involuntary Petition was filed in bad faith and is subject to controversion by the Debtor.

50.) Since the Debtor, in its present posture, is the alter ego of the Bank Group, only your Movant can represent the true interests of the Debtors, or what remains of the Debtors. That your Movant is in such a position is by no means unique: shareholder derivative actions are sufficiently established as to be covered by, for example, Rule 23.1 of the Ohio Rules of Civil Procedure, which sets out the manner in which a shareholder or other equitable claim is to be pursued when the corporation does not or will not pursue its rights. Here, because the Debtors have been alter egos of the Bank Group since before the inception of this Estate, only Mr. Maloof has the independent will to pursue their rights, especially as against the Bank Group.

51.) For the above reasons, your Movant prays for leave to controvert the Ch. 7 Involuntary Petition on behalf of the Debtors and to further challenge the election of Charles Sweet as Sole Director.

WHEREFORE, for the reasons set forth above, your Movant prays that the Agreed Order of June 11, 2002 be vacated as a fraud upon the Court and that your Movant be granted leave to answer and controvert the Involuntary Bankruptcy Petition as brought in bad faith. Your Movant prays further for such damages as this Court may deem just in the premises.

Respectfully Submitted,

/s/ _____
David C. Eisler, Counsel for William H. Maloof
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P. O. B. 1721
Medina, OH 44258
(216) 513-6369
inqs@AOL.com

SERVICE

Service was made by ordinary mail on those listed on the attached form
this 6th day of June, 2006.

/s/ _____
David C. Eisler, Counsel for William H. Maloof

SERVICE LIST

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Michael D. Zaveron
Benesch, Friedlander, Coplan & Aronoff, LLP
2300 BP Tower, 200 Public Square
Cleveland, OH 44114-2378

EXHIBIT “A”

Now comes Timothy Conklin, being of legal age and duly sworn according to law and deposeth and sayeth as follows:

- 1) Affiant was an employee of Level Propane Gases, Inc., in charge of the fleet of fifty (50) propane transport trucks operating in all of the Northern States in which Level Propane Gases, Inc. did business, as well those operated by Level Propane Gases, Inc. in Louisiana, Texas and Florida, at all times relevant to the events stated herein;
- 2) Affiant says further that on or about in the last week of May, 2002, Affiant was called into Patty Geitgey's office at the Level Propane Gases, Inc. headquarters in Westlake, Ohio;
- 3) Affiant says further that said Patty Geitchy was an employee of Newmarket Partners, LLC, acting as Chief Financial Officer. Newmarket Partners was a management consulting firm that had taken charge of the day-to-day executive functions of Level Propane Gases, Inc. Said Pat Geitchy reported directly to John Rudd, also an employee of Newmarket Partners, who was then acting as Chief Executive Officer of Level Propane Gases, Inc.;
- 4) Affiant says further that said Patty Geitchy told affiant to sit down and then asked affiant why he was directing his transport drivers to pull propane off of the Texas Eastern pipeline and place said gas in Level Propane's storage tanks;
- 5) Affiant says further that he responded that pulling propane off the pipeline was necessary to earn pipeline allocation, that is, the right to pull gas off the pipeline during the winter months, when there was peak demand and insufficient

pipeline capacity to serve all propane purchasers, among which was Level Propane Gases, Inc.;

6) Affiant says further that Patty Geitchy stated that "allocation is a myth" and further that "we have all the money we need to purchase gas whenever and wherever we need it." Said Patty Geitchy directed affiant to immediately instruct his transport fleet drivers to limit the amount of gas transported to no more than 25 loads per week; when the drivers were transporting 70 to 90 loads per week;

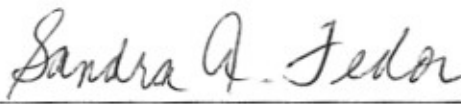
7) Affiant says further that he responded to this instruction by stating that "I would only take an order like that from Bill Maloof;"

8) Affiant says further that he was dismissed from the employment of Level Propane Gases, Inc., later that week.

FURTHER AFFIANT SAYETH NAUGHT.


Timothy Conklin

Sworn and subscribed before me, a Notary Public, in and for the State of Ohio by
TIMOTHY CONKLIN, this 19th day of APRIL, 2006.


Notary Public

SANDRA A. FEDOR
Notary Public, State of Ohio
My Commission Expires Sept. 18, 2010

STATEMENT MADE UNDER PENALTY OF PERJURY

Now comes William H. Maloof, being of legal age, signing below, and voluntarily makes the following statement under penalty of perjury:

1.) The undersigned has reviewed the Statement of Facts in the Motion to Vacate Agreed Order to which this Statement is attached, and hereby incorporates all of the facts set forth therein by reference as if fully rewritten herein. All of the facts hereby incorporated by reference are either known to him personally or, with respect to those facts which have been reported to him by others, known to him to his best knowledge and belief.



William H. Maloof



Date