

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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In re : Chapter 11  
 :  
LEVEL PROPANE GASES, INC., *et al.*, : Case No. 02-16172  
 : (Jointly Administered)  
 :  
Debtors. : Judge: RANDOLPH BAXTER  
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**DEBTORS' OBJECTION TO 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 PETITION FILED JUNE 6, 2002**

Level Propane Gases, Inc. ("Level") and its affiliated debtors and debtors in possession in these jointly administered cases (collectively, the "Debtors") under chapter 11 of Title 11 (the "Bankruptcy Code") of the United States Code, hereby object (the "Objection") to the *Motion of William H. Maloof to Vacate the Agreed Order Converting Chapter 7 Proceedings to Chapter 11 Proceedings Entered on June 10, 2002 and Motion for Leave to Controvert the Involuntary Petition Filed June 6, 2002* (the "Motion") and for the reasons set forth below request that the Motion be denied. In further support of their Objection, the Debtors state as follows:

**BACKGROUND**

1. These cases were commenced on June 6, 2002 (the "Petition Date" ) when Deutsche Bank Trust Company Americas, LaSalle Bank National Association and the Provident Bank (collectively the "Petitioning Creditors") filed involuntary petitions for relief (the "Involuntary Petitions") under Chapter 7 of the Bankruptcy Code (the "Chapter 7 Cases") against each of Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level, Level Energy Group, Inc. and WHM Emprises, Inc. (collectively, the

“Original Debtors”). Concurrent with the filing of the Involuntary Petitions, the Petitioning Creditors also filed their *Emergency Motion for Appointment of Interim Trustee and Related Relief*, seeking the immediate appointment of a trustee with the sole and exclusive authority to operate the Debtors’ businesses free from the interference of William H. Maloof, as necessary to preserve the property and prevent further loss to the Debtors’ estates on the grounds that William H. Maloof, the principal of the Debtors, had breached his fiduciary duties to the Debtors and caused them significant and irreparable harm.

2. Subsequent thereto, the Petitioning Creditors, the Debtors and Mr. Maloof entered into negotiations regarding the Involuntary Petitions. At all times during such negotiations, Mr. Maloof was personally represented by Richard A. Baumgart, a prominent, knowledgeable, local bankruptcy attorney with extensive experience in cases under chapter 7 and chapter 11 of the Bankruptcy Code.

3. On June 11, 2002, this Court entered an *Agreed Final Order and Stipulation: (a) Acknowledging the Authority of Charles Sweet as Sole Director of All Debtors; (b) Converting Cases to Voluntary Cases Under Chapter 11; (c) Granting Order for Relief Under Chapter 11; (d) Ordering Joint Administration of All Cases; and (e) Granting Other Relief* (the “Agreed Order”). Both Mr. Maloof and Mr. Baumgart, his personal counsel, were signatories to the Agreed Order.

4. The Agreed Order was supplemented on June 13, 2002 to clarify that orders for relief granted pursuant to the Agreed Order were to become effective as of June 17, 2002. On June 17, 2002, this Court entered its *Order Converting Cases to Cases Under Chapter 11 of the Bankruptcy Code*, pursuant to which the Chapter 7 Cases of the Original Debtors were converted to cases under chapter 11 of the Bankruptcy Code.

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

6. On or about April 30, 2003, almost a year after the Petition Date, the Court, on motion of the United States Trustee, ordered the appointment of an examiner in these cases. Thereafter, G. Ray Warner was appointed to serve as examiner (the “Examiner”) by the United States Trustee. The Examiner was directed by this Court to investigate:

Allegations . . . which indicate that counsel for the jointly administered Debtors in these cases has misled the Court, the Office of the United States Trustee, and parties in interest and have further failed to provide objective advice regarding the conduct of operations and management of the subject cases. More specifically, the U.S. Trustee asserts that allegations have been made that misconduct and nondisclosure by the Debtors’ counsel have caused unspecified harm to the Debtors’ estates and has prevented the Debtors from exercising their fiduciary obligations.

In furtherance of the aforesaid allegations and pursuant to provisions of §§ 1104(d) and 1196(b) of the Bankruptcy Code, the Examiner’s investigation is to be inclusive of any fact pertaining to the aforementioned allegations, fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the

management of the affairs of the Debtors, or to a cause of action available to the bankruptcy estates of the Debtors.<sup>1</sup>

7. On June 6, 2003, the Examiner – after reviewing thousands of pages of documents and conducting 22 sworn and unsworn witness interviews – filed his report with the Court. A report which (a) found, among other things, “no definitive evidence that Benesch engaged in improper communications with the Lenders or their counsel prior to the filing of the involuntary chapter 7 cases or that Benesch had an arrangement, an advance understanding, or a unilateral design to advance the interest of the Lenders at the expense of their then clients,” and “no evidence that Benesch was controlled by the Lenders and/or their counsel.” and (b) concluded that “Benesch . . . competently represented the interests of the Debtors in these cases.”<sup>2</sup>

8. Now, four years after the Petition Date, Mr. Maloof seeks an order vacating the Agreed Order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure (the “Civil Rules”).<sup>3</sup> Mr. Maloof contends that the Agreed Order was procured by fraud on the court. Specifically, Mr. Maloof alleges 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.<sup>4</sup>

9. In support of these allegations, Mr. Maloof incorporates into the Motion a lengthy “statement of the facts” that is remarkable for (a) its failure to recognize that subsequent to the entry of the Agreed Order every major event in these jointly administered

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<sup>1</sup> Examiner’s Report, Summary of Report – p. 4-5.

<sup>2</sup> *Id.* at p. 3-4.

<sup>3</sup> Made applicable herein by Rule 9024 of the Federal Rules of Bankruptcy Procedure.

<sup>4</sup> Motion, ¶1.

chapter 11 cases has been approved by this Court after notice, an opportunity to object and a hearing; (b) its omission of critical facts that contradict or are inconsistent with Mr. Maloof's version of events;<sup>5</sup> and (c) its failure to acknowledge the contrary conclusions reached by the Examiner after an examination that focused on "matters relating to the integrity of the bankruptcy process and matters impacting the Debtors' exercise of their fiduciary duties" in response to similar, prior allegations made by Mr. Maloof and others.<sup>6</sup>

10. Mr. Maloof points to no meaningful new evidence to support his claims except for bare "allegations" that Debtors' management disposed of or destroyed largely unspecified business and financial records of the Debtors. These charges of alleged spoliation of business records are based primarily on a handful of isolated incidents in which former employees of the Debtors purportedly witnessed the destruction of unspecified documents. A large portion of the allegations, moreover, relate to an incident in March 2003, in which one member of the Debtors' postpetition management cleaned out his office. This incident was thoroughly investigated by the Examiner, who "[b]ased upon the documents reviewed and the witness interviews, . . . found no evidence that the Debtors destroyed any documents that were responsive to a pending subpoena."<sup>7</sup> Indeed, the first allegation of document destruction, however, does not arise until almost 6 months after the entry of the Agreed Order. None of this new "evidence" provides a basis for granting Mr. Maloof the relief requested in the Motion.

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<sup>5</sup> The "statement of facts" fails, for example, to mention that (a) each of the prepetition offers to purchase the Debtor's propane distribution business touted by Mr. Maloof were subject to the completion of due diligence, (b) prior to the Petition Date Parthenon Capital, after completing some due diligence, reduced the amount of its purchase offer from \$129 million (Motion, p. 10) to \$26 million, an amount significantly below the Debtors' obligations to the Bank Group (Examiner's Report, pages 62 and 68); and (c) the sworn testimony of Steven Sues before this Court regarding the onerous conditions of the proposed settlement of the consumer protection litigation with the state of Ohio, conditions that would have rendered Level uncompetitive with other propane gas distributors in the marketplace (Docket No. 1989, Transcript of Hearing Held on July 2, 2003, pages 36-41).

<sup>6</sup> Examiner's Report – p. 1

<sup>7</sup> Examiner's Report – Summary of Report, p. 4.



## OBJECTION AND APPLICABLE LAW

9. Civil Rule 60(b) provides, in pertinent part: that:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (3) fraud, (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adversary party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court.<sup>8</sup>

As evident from its plain language, all such motions must be made within in a reasonable time, with the one year statute of limitations under subsections (b)(1) to (b)(3) being in addition, not in lieu of this requirement.<sup>9</sup>

10. Here, the Motion relies primarily on the evidence utilized by the Examiner in producing his report almost three years ago.<sup>10</sup> Notwithstanding the gravity of the claims asserted and the relief requested, Mr. Maloof offers no justification for a three year delay in bringing his Civil Rule 60(b) request to the Court.

11. Furthermore, the language of the rule indicates that Rule 60(b) provides only that a court *may* relieve a party form a final judgment. “The cases interpreting the rule have consistently held that, except when it is a motion under Rule 60(b)(4) for relief from a judgment

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<sup>8</sup> F.R.Civ.P. 60(b).

<sup>9</sup> 12 MOORE'S FEDERAL PRACTICE § 60.65[2][b] (Matthew Bender 3d ed. 2006).

<sup>10</sup> Motion, ¶ 2. Admittedly, Mr. Maloof also directs the Court's attention to more recent evidentiary submissions, all but two of which relate to his renewed claims regarding alleged destruction of business records of the Debtors by the Debtor's postpetition management. These submissions, the credibility of which have not been established, reflect nothing more than Mr. Maloof's continued solicitation of testimony from former employees of the Debtors years after the events at issue. The dilatory filing of this testimony is also indicative of a lack of due diligence in this matter.

that is totally void, a party has no right to relief.”<sup>11</sup> Thus, the decision as to whether relief should be granted is committed to the sound discretion of the court.<sup>12</sup>

**A. AS A PARTY TO THE AGREED ORDER, MR. MALOOF’S DISSATISFACTION WITH THE RESULTS OBTAINED IN THE DEBTORS’ CHAPTER 11 CASES DOES NOT PROVIDE A BASIS FOR RELIEF UNDER CIVIL RULE 60(b).**

12. Because Civil Rule 60 is designed to promote the finality of judgments, relief from consensual judgments is not favored. “Judgments that are rendered following a settlement by the parties are not judgments that result from full litigation on the merits. Nonetheless, unlike judgments rendered following a default, there is no policy favoring setting them aside on a Rule 60(b) motion.”<sup>13</sup> As noted by one court:

[W]hen, as in this case, the appellants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigation judgment, their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost.<sup>14</sup>

Further, carelessness or a lack of due care on the part of a litigant or the litigant’s attorney in negotiating a consent decree does not provide a basis for relief under Rule 60(b).<sup>15</sup>

13. Here, the order that Mr. Maloof seeks to vacate was an agreed order pursuant to which Mr. Maloof, among other things, agreed not to contest the involuntary petitions filed against the Debtors but to consent to the entry of orders for relief in the Chapter 7 Cases and to the conversion of the Debtors’ chapter 7 cases to cases under chapter 11 of the Bankruptcy Code. The Agreed Order was the result of arm’s length negotiation among the signatories subsequent to

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<sup>11</sup> *Id.* at § 60.22.

<sup>12</sup> *Douglass v. Pugh*, 287 F.2d 500, 502 (6th Cir. 1961) (“It is settled law that the granting of a motion under the provisions of Rule 60(b)(1), (2) and (6) is a matter addressed to the sound discretion of the trial judge, whose ruling will not be reversed except for an abuse of discretion on his part”).

<sup>13</sup> 12 MOORE’S FEDERAL PRACTICE § 60.22[4] (Matthew Bender 3d ed. 2006).

<sup>14</sup> *United States Steel Corp. v. Fraternal Association of Steelhaulers*, 601 F.2d 1269, 1274 (3<sup>rd</sup> Cir. 1979).

<sup>15</sup> *See, e.g., McLaughlin v. Jung*, 859 F.2d 1310, 1312-13 (7th Cir. 1988).

the filing of the Involuntary Petitions, with each party who signed the order being represented by experienced bankruptcy counsel during the course of the negotiations.

14. Now, four years later – years during which Mr. Maloof was an active participant in virtually every significant matter that came before the Court in these jointly administered cases – Mr. Maloof seeks to have the Agreed Order vacated so he may attempt to controvert the Involuntary Petitions.<sup>16</sup> He goes through great contortions, all of which are a reflection of his dissatisfaction with the results that have been achieved during the administration of these chapter 11 cases subsequent to the entry of the Agreed Order, to argue that his signature on the Agreed Order – consenting to the entry of orders for relief in the Chapter 7 Cases and the conversion of those cases to cases under chapter 11 – was made under duress.

15. In connection with the claim of duress, Mr. Maloof directs this Court's attention to three cases cited as illustrative of the kinds of alleged economic duress he purportedly experienced at the time he signed the Agreed Order. None of the cases cited, however, actually determines that the alleged acts constituted economic duress. Instead, each concludes only that claims of economic duress and fraud, when raised, must be considered in connection with a determination as to the validity of a settlement agreement.

16. In *First National Bank of Cincinnati v. Pepper*, 454 F.2d 626 (2<sup>nd</sup> Cir. 1972), the United States Court of Appeals for the Second Circuit held that contested allegations that an attorney had improperly withheld documents critical to a time sensitive closing to coerce a legal

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<sup>16</sup> Based on the Motion, it appears that Mr. Maloof seeks the relief requested in the Motion so he can be afforded an opportunity to demonstrate that the Bank Group acted in bad faith in filing the Involuntary Petitions and to pursue the Bank Group for damages. Mr. Maloof's filing of a civil suit against the Bank Group in the United States District Court for the Northern District of Ohio on June 4, 2006, denominated *William H. Maloof, Individually and as sole shareholder or beneficial owner of Level Propane Gases, Inc. and its subsidiary affiliates, Park Place, Inc., and its subsidiary affiliates, and WHM Emprises, Inc. and its subsidiary affiliates v. BT Commercial Corp. Individually and as Agent of Deutsche Bank Trust Company Americas; Provident Bank; LaSalle National Bank Association* and docketed as Case No. 06-CV-01378, indicates, however, that the relief requested in the Motion is unnecessary to enable him to assert his damage claims against the Bank Group.

fee compromise agreement precluded a summary judgment as to the conclusive effective of that compromise. Significantly, the Second Circuit noted that if the attorney's retaining lien was valid in any respect, his insistence upon it could not have subjected the other parties to duress "for generally it cannot be duress for a party to insist upon its legal rights."<sup>17</sup> Similarly, duress should not be found in these cases where the Bank Group was merely insisting upon the exercise of its legal rights under its prepetition credit agreement with the Debtors, the personal guaranty and the stock pledge granted to them by Mr. Maloof and its legal right to commence involuntary cases under section 303 of the Bankruptcy Code.

17. In *Citibank N.A. v. Real Coffee Trading Company, N.V.*, 566 F.Supp. 1158 (D. Ct. S.D.N.Y. 1983), the district court similarly denied a motion for summary judgment because of substantial factual issues regarding claims that the settlement agreement underlying the promissory notes the bank was trying to collect was the product of economic duress and fraud. Similarly, in *U.S. v. Denham*, 817 F.2d 1307 (8th Cir. 1987), the United States Court of Appeals for the Eighth Circuit concluded that the Court below had erred in refusing to consider the Denhams' allegations that an attorney whose actions were allegedly not authorized by the Denhams, whose prior liens on the Denhams' property created a conflict of interest, and whose failure to prepare and assert defenses on their behalf had forced their consent in determining the validity of a stipulation entered of record in the Denhams' absence. None of the courts in any of the cases cited by Mr. Maloof made a determination as to the validity of the claims of duress or economic duress.

18. As noted above, Mr. Maloof cannot legally establish a claim of duress where, as here, the Bank Group was merely exercising its legal remedies under both the Bankruptcy Code

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<sup>17</sup> *Pepper*, 454 F.2d at 633.

and the prepetition financing agreement with the Debtors, including its rights under Mr. Maloof's personal guaranty and stock pledge. Moreover, Mr. Maloof's allegations of duress are simply disingenuous in the face of: (a) Mr. Maloof's prepetition exploration of and the commencement of preparations for possible chapter 11 filings for certain of the Debtors in the months prior to the Petition Date – an indication of his awareness of the Debtors' financial straits and of the possible need to seek bankruptcy protection to deal with those issues and/or to effectuate a going concern sale of the Debtors' propane distribution business; and (b) his admitted intention to have commenced chapter 11 cases for the Debtors prior to the filing of the involuntary petitions as a possible means of pre-empting the Bank Group's exercise of its rights under a certain stock pledge agreement wherein Mr. Maloof had pledged his stock in the Debtors to secure the Debtors' obligations to the Bank Group and perhaps forestall subsequent actions to remove him from management of the Debtors.<sup>18</sup> Having clearly intended to put the Debtors into chapter 11 himself immediately prior to the filing of the Involuntary Petitions, his subsequent consent in the Agreed Order – a decision made in consultation with knowledgeable bankruptcy counsel fully capable of advising him of the potential consequences of such an action – to entries of orders for relief and the conversion of the Debtors' cases to cases under chapter 11 merely achieved his intended result. Mr. Maloof's present dissatisfaction with the results obtained for the Debtors' estates in these cases is simply not a proper basis for relief under Civil Rule 60(b). Accordingly, the Motion must be denied.

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<sup>18</sup> Motion, ¶28.

**B. MR. MALOOF IS NOT ENTITLED TO RELIEF UNDER CIVIL RULE 60(b)(6) BECAUSE THE RELIEF REQUESTED FALLS WITHIN THE AMBIT OF SUBSECTIONS (b)(2) AND/OR (b)(3) OF THE RULE AND CANNOT THEREFORE, BE A PROPER BASIS FOR A MOTION UNDER CIVIL RULE 60(b)(6).**

19. Mr. Maloof purports to seek relief under subsection (6) of Civil Rule 60(b).

Although Civil Rule 60(b)(6) provides for relief from judgment if there is “any other reason justifying relief from the operation of the judgment,” it does not provide a court with unfettered discretion to set aside a judgment in all cases.<sup>19</sup> As “catch-all” provision, Civil Rule 60(b)(6) is narrowly interpreted. As noted by the leading treatise on civil procedure:

1. The provision applies only when there are reasons for relief other than those set out in the more specific clauses of Rule 60(b). To read the provision any other way would eliminate the need for the specific provisions and would eliminate the limitations that are imposed on those specific provisions.
2. There must always be a valid reason justifying relief from a judgment. In fact, the courts always require that there be “extraordinary circumstances” justifying relief. To read the provisions otherwise would permit the discretion vested in a court by Rule 60(b)(6) to be used to make unnecessary inroads into judgments that would otherwise be final, or to transform Rule 60(b) into a substitute for appeals.<sup>20</sup>

Moreover, if the reasons offered for the relief from judgment could be considered under one of the more specific clauses of Civil Rule 60(b)(1) – (5), those reasons will not justify relief under Civil Rule 60(b)(6). “Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from final judgment . . . provided that the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).”<sup>21</sup> In particular, the courts have consistently held that the grounds set forth in clauses (b)(1) to (b)(3) and which require that the motion be made within one year of the entry of the judgment may not be the basis of a Civil Rule (60)(b)(6)

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<sup>19</sup> See *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993) (rule used “sparingly as an equitable remedy to prevent manifest injustice”).

<sup>20</sup> 12 MOORE’S FEDERAL PRACTICE § 60.48[1] (Matthew Bender 3d edition 2006).

<sup>21</sup> *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 863 & n. 11. (1988).

motion after the one year period has elapsed.<sup>22</sup> To hold otherwise would render the one year time limit meaningless. Additionally, the one year statute of limitations is in addition to, not in lieu of, the requirement that a motion under Civil Rule 60(b) be made within a reasonable time after the entry of the judgment.

20. Even a cursory examination of Mr. Maloof's Statement of Facts indicates that it is based primarily on evidence gathered three years ago by the Examiner. Notwithstanding the gravity of the claims asserted and the relief requested, Mr. Maloof offers no justification for a three year delay in bringing his Civil Rule 60(b). Mr. Maloof argues instead that he is seeking the relief requested in the Motion "only as a result of a chance remark by Pat Tighe, his former safety director at Level Propane, that he saw document spoliation in December 2002."<sup>23</sup> To the extent that Mr. Maloof may be deemed to be seeking relief on the basis of newly discovered evidence, he cannot obtain relief on that basis under Civil Rule 60(b)(6) since the discovery of new evidence is specifically covered by Civil Rule 60(b)(2) and subject to the one year statute of limitations.

21. Civil Rule 60(b)(3) provides a court the discretion to grant a motion to relieve a party from final judgment, order or proceeding on the grounds of fraud, misrepresentation, or other misconduct of an adverse party.<sup>24</sup> Beside the bare, unsupported claim that the Chapter 7 Cases were commenced in bad faith, it appears that the Motion is predicated wholly on allegations that the Bank Group and the Debtors were disingenuous in representing to the court that the Agreed Order was intended to resolve the issues surrounding the commencement of the Involuntary Cases "in a manner that will preserve and protect the businesses and assets Debtor's

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<sup>22</sup> *Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380, 393 (1993); *McDowell v. Dynamics Corporation of America*, 931 F.2d 380, 384 (6th Cir. ); *Smith v. Secretary of Health & Human Services*, 776 F.2d 1330, 1333 (6th Cir. 1985).

<sup>23</sup> Motion, ¶ 47.

<sup>24</sup> F.R.Civ.P. 60(b)(3).

estates, prevent any further losses thereto, and maximize the value of the Debtors as going concerns for the benefit of their estates and creditors.”<sup>25</sup> Even were such a claim to rise to the level of misrepresentation or fraud, it would clearly fall within the ambit of Civil Rule 60(b)(3) as a fraud by one party upon another and as such be subject to the one year statute of limitations applicable to that provision. Under the case law cited above, such a claim would not, therefore, constitute a basis for relief under Civil Rule 60(b)(6). Accordingly, the Motion must be denied.

**C. MR. MALOOF HAS NOT SATISFIED ANY OF THE ELEMENTS NECESSARY TO ESTABLISH FRAUD UPON THE COURT.**

22. Although the Motion asserts entitlement to relief under Civil Rule 60(b)(6), it may also be construed as being based upon the so-called saving clause of the rule which provides that “[t]his rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court.” As concisely described by the United States Court of Appeals for the Second Circuit:

Fraud on the court is “fraud which seriously affects the integrity of the normal process of adjudication.” *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2<sup>nd</sup> Cir. 1988). It involves “far more than an injury to an individual litigant” or “a case of a judgment obtained [simply] with the aid of a witness who, on the basis of after-discovered evidence, is believed to possibly to have been guilty of perjury.” *Id.* (citations omitted) (alteration in original). The concept embraces “that species of fraud which does or attempts to, defile the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication.” *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2<sup>nd</sup> Cir. 1972) (quoting 7 MOORE’S FEDERAL PRACTICE ¶60.33, at 515 (1971 ed.)).<sup>26</sup>

The Sixth Circuit has ruled that the elements of fraud upon the Court consists of conduct:

1. On the part of an officer of the Court;
2. That is directed to the “judicial machinery” itself;
3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;

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<sup>25</sup> Motion, ¶¶39 and 40.

<sup>26</sup> *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457 (2<sup>nd</sup> Cir. 1994).

5. That deceives the court.<sup>27</sup>

Thus, as noted by the leading treatise on the Federal Rules of Civil Procedure, “misconduct of an officer of the court is an essential element of fraud on the court only if this misconduct precludes proper adjudication by the court.”<sup>28</sup> Fraud on the court requires more than a showing of misconduct by one of the parties to the suit:

Fraud on the court must be construed narrowly, not only to protect the finality of judgments generally, but specifically to protect the integrity of Rule 60(b)(3), which permits a motion for relief from judgments because of the fraud of a party, but which is limited by a one year period in which the motion may be brought. If fraud on the court were to be given a broad interpretation that encompassed virtually all forms of fraudulent misconduct between the parties, judgments would never be final and the time limitations of Rule 60(b) would be meaningless.<sup>29</sup>

23. The Motion asks the Court to vacate the Agreed Order. Mr. Maloof, however, has established none of the elements necessary to demonstrate a “fraud on the court” with respect to the Agreed Order. The Motion contains no specific allegations of (a) any conduct by an officer of the Court (b) directed to the judicial machinery itself, (c) that is intentionally false, willfully blind to the truth or is in reckless disregard for the truth, (d) that is a positive averment or concealment when under a duty to disclose and (e) that deceived the Court, *i.e.*, the specific elements of “fraud on the court” as set forth by the Sixth Circuit in the *Demanjuk* decision. At best, the Motion contains broad, unsubstantiated allegations that the Involuntary Petitions were filed in bad faith. Allegations which, from the Motion, appear to be premised on the claim that instead of “preserving and protecting the businesses and assets of the Debtors’ estates and preventing any further losses thereto,” as stipulated in the Agreed Order, the Bank Group intended to “strip Level Propane of all

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<sup>27</sup> *Demanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

<sup>28</sup> 12 MOORE’S FEDERAL PRACTICE § 60.21[4][B] (Matthew Bender 3d ed.)

<sup>29</sup> *Id.*, at § 60.21[4][c].

of its physical assets and all of its customers so that all of the going concern was its satellite delivery system.”<sup>30</sup>

24. Even assuming for the sake of argument that the Bank Group had such a design, it does not rise to a “fraud on the court” that would justify vacating the Agreed Order. By entering into the Agreed Order all parties acknowledged that the Debtors’ businesses were in financial distress and would benefit from the relief provided by the imposition of the automatic stay. The signatories to the Agreed Order further agreed that it was in the best interest of the Debtors to operate their businesses as debtors and debtors in possession under chapter 11 of the Bankruptcy Code as opposed to a fire sale liquidation under chapter 7 of the Bankruptcy Code. The fact that the Debtors, while under Mr. Maloof’s management, had explored the possibility of filing for chapter 11 relief in connection with a possible sale of their propane distribution business and the fact that Mr. Maloof had intended to file chapter 11 cases for the Debtors to preempt the Bank Group’s actions clearly indicates that neither the acknowledgement of the Debtors’ financial distress nor the conversion of the Chapter 7 Cases to cases under chapter 11 of the Bankruptcy Code were the result of any false conduct of or misrepresentation by the Bank Group.

25. Neither can Mr. Maloof demonstrate that the entry of the Agreed Order prevented the Court from “perform[ing] in the usual manner its impartial task of adjudging cases.”<sup>31</sup> The Agreed Order merely provided that the actions of the Bank Group in enforcing its rights under the prepetition credit facility with the Debtors and under the personal guaranty and stock pledge of Mr. Maloof, would be taken in the Bankruptcy Court – and in accordance with the Bankruptcy Code and its statutory protections for both creditors and equity holders – rather than in another judicial forum. In chapter 11, the actions of Debtors’ management were subject to the review of the Committee and

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<sup>30</sup> Motion - ¶¶ 39-40.

<sup>31</sup> *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1439, 1356 (4th Cir. 1982).

other parties in interest – including, in this instance, Mr. Maloof. All actions outside of the ordinary course of business, were subject, after notice and an opportunity for a hearing, to approval by this Court. It is in this context, that the Debtors’ businesses were subsequently sold, following an opportunity to conduct due diligence, as “going concerns” to unrelated third parties in arms’ length transactions. In no way can Agreed Order be said to have “defiled” the Court or otherwise prevent it from performing in the usual manner its impartial task of adjudging cases.

26. Mr. Maloof’s alleged “fraud” appears to be premised primarily on his belief that the Debtor’s estates received less value from the sale of their propane distribution businesses than he anticipated based upon certain prepetition offers received from the Debtors’ competitors. Mr. Maloof’s dissatisfaction with the results in these jointly administered bankruptcy cases does not constitute a basis for a finding that the Agreed Order constituted a fraud on the Court. Accordingly, the Motion must be denied.

Dated: June 20, 2006  
Cleveland, Ohio

Respectfully submitted,

/s/ Michael D. Zaverton  
Mark A. Phillips (OBR #0047347)  
Michael D. Zaverton (OBR #0038597)  
BENESCH, FRIEDLANDER,  
COPLAN & ARONOFF LLP  
2300 BP Tower, 200 Public Square  
Cleveland, Ohio 44114-2378  
(216) 363-4500  
(216) 363-4588 Facsimile  
[mphillips@bfca.com](mailto:mphillips@bfca.com)  
[mzaverton@bfca.com](mailto:mzaverton@bfca.com)

Attorneys for Level Propane Gases, Inc., *et al.*,  
Debtors and Debtors in Possession

## CERTIFICATE OF SERVICE

A copy of the foregoing *Objection* was sent by regular U.S. Mail, this 20<sup>th</sup> day of June,

2006, to the following:

AOL/CompuServe  
Attn: A. Brian Dengler  
5000 Arlington Center Blvd.  
Columbus, OH 43220

Baker & Hostetler LLP  
Attn: Michael A VanNiel, Esq  
3200 National City Center  
1900 East Ninth Street  
Cleveland, OH 44114-3485

Baker & Hostetler LLP  
Attn: Jeffrey A. Baddeley, Esq.  
3200 National City Center  
1900 East Ninth Street  
Cleveland, OH 44114-3485

Baker & Hostetler LLP  
Attn: Matthew R. Goldman, Edward G.  
Ptaszek,  
3200 National City Center  
1900 East Ninth Street  
Cleveland, OH 44114-3485

Blank Rome LLP  
Attn: Nathaniel R. Jones, Esq.  
1700 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202

Blank Rome LLP  
Attn: Samuel H. Becker, Esq.  
One Logan Square  
Philadelphia, PA 19103-6998

Bradshaw, Steele, Cochrane & Berens, L.C.  
Attn: Paul H. Berens, Esq.  
3113 Independence  
POB 1300  
Cape Girardeau, MO 63702-1300

BT Commercial Corporation  
c/o Deutsche Bank Securities Inc.  
Corporate and Investment Bank  
Attn: William Howe, Wayne Hillock  
Mail Stop CHI05-2900, 222 South Riverside Plaza  
Chicago, IL 60606

Cavitch, Familo, Durkin & Frutkin Co., L.P.A.  
Attn: Harold O. Maxfield Jr., Esq.  
The East Ohio Building, 14th Floor  
Cleveland, OH 44114

Collins & Scanlon, LLP  
Attn: Thomas J. Scanlon, Esq.  
3300 Terminal Tower  
50 Public Square  
Cleveland, OH 44113

Contrarian Capital Management, L.L.C.  
Attn: Seth Lax  
411 West Putnam Avenue, Suite 225  
Greenwich, CT 06830

Cotham, Harwell & Evans  
Attn: Mark C. Harwell, Esq.  
1616 S. Voss, Suite 200  
Houston, TX 77057

Steven S. Davis Co., LPA  
Attn: Steven S. Davis, Esq  
450 Standard Building  
Cleveland, OH 44113

Dettelbach, Sicherman & Baumgart  
Attn: Richard A. Baumgart, Esq.  
1100 Ohio Savings Plaza  
1801 E. 9th Street  
Cleveland, OH 44114

Dickinson, Mackaman, Tyler & Hagen, P.C.  
Attn: Jon P. Sullivan, Esq.  
1600 Hub Tower, 699 Walnut  
Des Moines, IA 50309

Dinsmore & Shohl LLP  
Attn: Kenneth R. Cookson, Esq.  
175 South Third Street  
Columbus, OH 43215

Duvin, Cahn & Hutton  
Attn: Sue Marie Douglas, Esq.  
Erievue Tower, 20th Floor  
1301 East 9th Street  
Cleveland, OH 44114-1817

eCAST Settlement Corporation  
c/o Becket and Lee LLP  
Attn: Sarah E. Pugh, Wendell H. Livingston,  
& Barbara K. Hamilton  
P. O. Box 35480  
Newark, NJ 07193-5480

Equal Justice Foundation  
Attn: Kimberly M. Skaggs, Esq.  
88 East Broad Street, Suite 1590  
Columbus, OH 43215

Field & Golan  
Attn: Barbara L. Yong, Matthew J. Cozzi,  
Elizabeth E. Sobek  
70 West Madison, Suite 1500  
Chicago, IL 60602-4206

Frantz Ward LLP  
Attn: Colleen C. Murnane, Matthew H.  
Matheney  
55 Public Square Building, 19th Floor  
Cleveland, OH 44113

Frost Brown Todd LLC  
Attn: Vincent E. Mauer, Andrew J. Marovich  
2200 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202-4182

Gardner Carton & Douglas LLP  
Attn: Edwin E. Brooks, Esq.  
191 North Wacker Drive, Suite 3700  
Chicago, IL 60606-1698

Graydon Head & Ritchey LLP  
Attn: J. Michael Debbeler, Esq.  
1900 Fifth Third Center  
511 Walnut Street  
Cincinnati, OH 45202

Greenberg Traurig, P.C.  
Attn: Nancy A. Peterman, Esq.  
Kevin D. Finger, Esq.  
77 West Wacker Drive, Suite 2500  
Chicago, IL 60601

Hahn Loeser & Parks LLP  
Attn: Lee D. Powar, Lawrence E. Oscar,  
Daniel A. DeMarco, Nancy A. Valentine,  
Harry D. Mercer, Christopher W. Peer  
200 Public Square, 3300 BP Tower  
Cleveland, OH 44114-2301

IFC Credit Corporation  
Attn: John R. Zinke Jr., Esq.  
8700 Waukegan Road, Suite 100  
Morton Grove, IL 60053

Indiana (State of) Attorney General  
Attn: David A. Paetzmann, Dep. Atty. Gen.  
Indiana Government Center South, 5th FL  
402 W. Washington Street  
Indianapolis, IN 46204

IOS Capital, Inc.  
Attn: Bankruptcy Administration  
1738 Bass Road  
P. O. Box 13708  
Macon, GA 31208-3708

Janik & Dorman, LLP  
Attn: Thomas D. Lambros, Andrew J.  
Dorman, Ellyn Mehendale, Barry R. Murner  
9200 South Hills Blvd., Suite 300  
Cleveland, OH 44147

Javitch, Block, Eisen & Rathbone  
Attn: Marc A. Melamed, Esq.  
1300 East Ninth Street, 14th Floor  
Cleveland, OH 44114-1503

Jenkins & Kling, P.C.  
Attn: Stephen L. Kling Jr., Esq.  
Jennifer M. Dau, Esq.  
10 S. Brentwood Blvd., Suite 200  
Clayton, MO 63105

Jenner & Block  
Attn: Jeff J. Marwil  
One IBM Plaza  
Chicago, IL 60611-7603

Kabat, Mielziner & Sobel  
Attn: Bruce L. Mielziner, Kevin R. McMillan  
25550 Chagrin Blvd., Suite 403  
Beachwood, OH 44122

Kahn, Kleinman, Yanowitz, et al.  
Attn: Stuart Larsen, Esq.  
The Tower at Erieview  
Suite 2600  
Cleveland, OH 44114-1824

Katten Muchin Zavis Rosenman  
Attn: Edwin E. Brooks, Esq.  
525 West Monroe Street, Ste. 1600  
Chicago, IL 60661

Kelley Drye & Warren LLP  
Attn: James S. Carr, Keith H. Wofford, Esq.  
101 Park Avenue  
New York, NY 10178

Kentucky Office of Attorney General  
Attn: Dennis G. Howard, II, Asst. Atty. Gen.  
Office of Rate of Intervention  
1024 Capital Center Drive, Suite 200  
Frankfort, KY 40601-8204

Level Propane Gases, Inc.  
c/o Natasha Brandt  
4204 S. Broadway Avenue  
Lorain, OH 44052

Level Propane Gases, Inc.  
c/o Charles E. Sweet  
856 Havana Drive  
Boca Raton, FL 33487

Linebarger Goggan Blair & Sampson, LLP  
Attn: John P. Dillman, Esq.  
P. O. Box 3064  
Houston, TX 77253-3064

David Eisler, Esq.  
P.O. Box 1721  
Medina, OH 44258

Maloof, William H.  
5074 Brompton Drive  
Medina, OH 44256

Maloof, William H.  
8805 Tamiami Trail N  
PMB 313  
Naples, FL 34108

Maloof, William H.  
P. O. Box 1721  
Medina, OH 44258

Margulies & Levinson, LLP  
Attn: Jeffrey M. Levinson, Esq.  
30100 Chagrin Boulevard, Suite 250  
Pepper Pike, OH 44124

McCarthy, Lebit, Crystal & Liffman Co., LPA  
Attn: Robert Balantzow, Robert Schwartz  
1800 Midland Building  
101 Prospect Avenue, West  
Cleveland, OH 44115

McCreary, Veselka, Bragg & Allen, P.C.  
Attn: Michael Reed  
P. O. Box 26990  
Austin, TX 78755-0990

McNamara, Hanrahan, Callender & Loxterman  
Attn: Patrick R. Hanrahan, Esq.  
Kirk F. Loxterman, Esq.  
8440 Station Street  
Mentor, OH 44060

Messerman & Messerman Co., LPA  
4100 Key Tower  
127 Public Square  
Cleveland, OH 44114

Michigan, State of (Office of Atty. Gen.)  
Attn: Nancy A. Piggush, Esq.  
Consumer Protection Division  
P.O. Box 30213  
Lansing, MI 48909

Michigan, State of (Office of Atty. Gen.)  
Attn: Steven B. Flancher, Esq.  
Revenue Division  
First Floor, Treasury Building  
Lansing, MI 48922

Michael A. Cox, MI Attorney General  
Victoria A. Reardon, Asst. Atty. Gen.  
3030 W. Grand Blvd., Ste. 10-200  
Detroit, MI 48202

Missouri, State of (Office of Atty. Gen.)  
Attn: Christie A. Kincannon, Esq.  
Broadway State Office Building  
P. O. Box 899  
Jefferson City, MO 65102

Missouri, State of (Office of Atty. Gen.)  
Attn: Brian J. LaFlamme, Esq.  
MO Dept. of Rev., General Counsel's Office  
301 W. High Street, Room 670, P. O. Box 475  
Jefferson City, MO 65105-0475

Morgan & Pottinger, P.S.C.  
Attn: Hal D. Friedman, Esq.  
601 West Main Street  
Louisville, KY 40202

Morris, Nichols, Arsht & Tunnell  
Attn: Eric D. Schwartz, Robert J. Dehney  
1201 N. Market Street  
P. O. Box 1347  
Wilmington, DE 19899-1347

Nantz, Litowich, Smith & Girard  
Attn: Sandra S. Hamilton, Esq.  
2025 East Beltline, S.E.  
600 Weyhill Building  
Grand Rapids, MI 49546-7671

New Mexico Attorney General, Office of  
Attn: Richard B. Word, Asst. Atty. Gen.  
P. O. Drawer 1508  
Santa Fe, NM 87504-1508

Michael A. Cardozo, Corporation Counsel of  
the City of New York  
Attn: Bernadette Brennan, Esq.  
100 Church Street, Room 5-247  
New York, NY 10007

New York State Dept. of Law  
Attn: Carlos Rodriguez, Asst. Atty. Gen.  
144 Exchange Boulevard  
Rochester, NY 14614

Newmarket Partners, LLC  
Attn: John S. Rudd  
2530 Superior Avenue  
Suite 7B  
Cleveland, OH 44114

Occidental Energy Marketing, Inc.  
Attn: Andrea Reichel Kunkel, Esq.  
5 E. Greenway Plaza, Suite 2400  
P. O. Box 27570  
Houston, TX 77227

Ohio Attorney General, Office of  
Attn: Michele A. Shuster, Asst. Atty. Gen.  
Consumer Protection Section  
30 E. Broad St., 14th Floor  
Columbus, OH 43215

Ohio Attorney General, Office of  
Attn: Thomas D. McGuire, Asst. Atty. Gen.  
State Office Building  
615 W. Superior, 11th Floor  
Cleveland, OH 44113-1899

Pennsylvania Office of Attorney General  
Attn: Marcia L. Telek DePaula  
Bureau of Consumer Protection  
6th Floor, Manor Complex, 564 Forbes Ave.  
Pittsburgh, PA 15219

Quinn, Buseck, Leemhuis, Toohey, et al.  
Attn: Lawrence C. Bolla, Esq.  
2222 West Grandview Boulevard  
Erie, PA 16506-4508

Rabin & Rabin Co., LPA  
Attn: Mary Ann Rabin, Esq.  
55 Public Square, Suite 1510  
Cleveland, OH 44113

Reed Smith LLP  
Attn: Joseph O'Neil, Jr., Esq.  
Zachary M. Harrison, Esq.  
599 Lexington Avenue  
New York, NY 10022

Roetzel & Andress  
Attn: Diana M. Thimmig, Esq.  
1375 East Ninth Street  
One Cleveland Center, 9th FL  
Cleveland, OH 44114

Mr. Brian Salvagni  
2242 Violet Court  
Suite 1000  
Avon, OH 44011

Schottenstein, Zox & Dunn  
Attn: M. Colette Gibbons, Esq.  
US Bank Centre  
1350 Euclid Ave., Suite 1400  
Cleveland, OH 44115

Schottenstein, Zox & Dunn Co., L.P.A.  
Attn: E. James Hopple, Esq.  
41 S. High Street, Suite 2600  
Columbus, OH 43215

Law Offices of Kenneth F. Seminatore, Esq.  
Attn: Kenneth F. Seminatore, Esq.  
Suite 1715, The Superior Building  
815 Superior Avenue  
Cleveland, OH 44114-2700

Sonnenschein, Nath & Rosenthal  
Attn: Patrick C. Maxcy, Esq.  
Pia Thompson, Esq.  
8000 Sears Tower  
Chicago, IL 60606

Squire, Sanders & Dempsey L.L.P.  
Attn: G. Christopher Meyer, Esq.  
4900 Key Tower  
127 Public Square  
Cleveland, OH 44114-1304

Jack M. Schulman, Esq.  
1700 Standard Building  
1370 Ontario Street  
Cleveland, OH 44113

Snipper, Wainer & Markoff  
270 N. Canon Drive, Penthouse  
Beverly Hills, CA 90210

Sheldon Stein, Esq.  
400 Terminal Tower  
P. O. Box 5606  
Cleveland, OH 44101

Sues, Steven G.  
7444 Royal Portrush Drive  
Solon, OH 44139

Taft, Stettinius & Hollister LLP  
Attn: William J. Stavole, Kimberlie L. Huff  
3500 BP Tower, 200 Public Square  
Cleveland, OH 44114-2302

Taft, Stettinius & Hollister LLP  
Attn: Donna M. Flammang, Timothy J. Duff,  
Charles A Bowers, Esq.  
3500 BP Tower, 200 Public Square  
Cleveland, OH 44114-2302

Tennessee Dept. of Labor & Workforce  
Develop. Unemployment Insurance  
c/o TN Atty. General's Office, Bkrtcy Div.  
Attn: Marie Antoinette Joiner  
P. O. Box 20207  
Nashville, TN 37202-0207

Thompson Hine LLP  
Attn: Alan R. Lepene, Esq.  
Robert C. Folland, Esq.  
3900 Key Center, 127 Public Square  
Cleveland, OH 44114-1291

Ulmer & Berne LLP  
Attn: Michael S. Tucker, Esq.  
Skylight Office Tower  
1660 West 2nd Street, Suite 1100  
Cleveland, OH 44113-1448

United States Trustee (Office of)  
Attn: Andrew R. Vara, Esq.  
201 Superior Avenue, Suite 441  
Cleveland, Ohio 44114

Mr. John Verbos  
20007 Trapper Trail  
Strongsville, OH 44136

G. Ray Warner, Esq.  
c/o Greenberg Traurig, LLP  
77 West Wacker Drive, Suite 2500  
Chicago, IL 60601

Weltman, Weinberg & Reis Co., L.P.A.  
Attn: Alan C. Hochheiser, Edward Bailey  
Lakeside Place, Suite 200  
323 W. Lakeside Avenue  
Cleveland, OH 44113-1099

West Virginia Office of the Attorney General  
Attn: Douglas L. Davis, Asst. Atty. Gen.  
812 Quarrier Street, 4th FL  
P. O. Box 1789  
Charleston, WV 25326-1789

Wisconsin Office of Attorney General  
Attn: Barbara W. Tuerkheimer, Esq.  
Wisconsin Dept. of Justice  
17 West Main Street, P. O. Box 7857  
Madison, WI 53707-7857

Wyatt, Tarrant & Combs, LLP  
Attn: Robert J. Brown, Esq.  
1600 Lexington Financial Center  
250 West Main Street  
Lexington, KY 40507-1746

/s/ Michael D. Zaveron