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

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

MOVANT'S RESPONSE
TO OBJECTION TO HIS MOTION TO VACATE AGREED CONVERSION ORDER OF JUNE 11, 2002 AND SALE ORDER OF THE GOING-CONCERN ASSETS OF LEVEL PROPANE OF JUNE 27, 2003

Now comes William H. Maloof, by and through counsel undersigned, and for his response to the purported Debtors' Objection to his Motion to Vacate the Orders of June 11, 2002 and June 27, 2003 states as follows:

The Objections are set out under three heads: that the Motion does not state factual grounds to vacate the Orders on the basis of fraud upon the Court, that the Motion is barred by collateral estoppel, and that the Motion is barred as untimely. Each of these objections was anticipated in the Movant's initial pleading, but bears reiteration in light of the Debtors' attempt to deflect the impact of his new evidence and to distort his argument.

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Movant has Sufficient Evidence to Demonstrate Fraud on the Court.

The Objection attempt to bypass the evidence presented with this Motion by simply ignoring it. They justify this by claiming that the present Motion presents the identical facts with the identical theory as in the Motion to Vacate filed in June, 2006. A cursory reading of this Motion reveals that nothing could be further from the case: each strand of fraud by officers of the court is supported by unchallenged evidence and the

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courses of fraudulent conduct, together with their participants is clearly articulated, see Appendix, “Officers of the Court and Their Conduct,” to the Third Amended Motion. Movant has articulated four (4) distinct courses of fraudulent conduct by no less than 9 officers of the court. Benesch, Friedlander, Coplan & Aronoff (BFCA) will have the Court believe that they are the only officer of the court owing any duty to the court so that their claim of exoneration by the Examiner can operate as a claim that the Examiner found the proceedings unblemished. In so doing they attempt to bypass the holding of the District Court in *Maloof v. Level Propane Gases, Inc.,* 07-0153, U.S.D.C.,N.D.O., Docket 19:

> “The Court finds the *Hazel-Atlas* line of cases to stand for the proposition that where fraud on court can be proved, even a final judgment may be upset in the interest of justice,” at 5.

Their attempt to construe *In Re Intermagnetics* 926 F.2d 912 (9th Cir., 1991) as Sec. 363 case is crucial to their argument, since they seek, characteristically, to deflect attention from its definition of an officer of the court in bankruptcy proceedings, which embraces appointed professionals and officers of the Debtor in Possession, for which Movant cited the case. Finally, each of the courses of conduct is supported by evidence that is attached as exhibits to the Motion.

The first course of fraudulent conduct is the pre-petition seizure of control of the companies by the Bank Group and the frustration of the attempt to sell the home-heat portion of Level Propane, see Exhibits 1, 2 and 3. In addition, Movant submits here, attached as Ex. “A,” the Statement of Bradley Maloof, in which he narrates a meeting held at the offices of BFCA in which the members of the Maloof family were gathered in an attempt to align them with the interests of the Bank Group outside of Movant’s

presence. The pre-petition conduct, the establishment of the Forbearance Agreement (Ex. 2), the meeting with the Maloof family, and the frustration of earned pipeline allocation (Ex. 3) all take on vivid significance in light of the ***District Court's determination that BFCA were "officers of the court representing the Bank Group"*** by Judge Aldrich in *Maloof v. Level Propane Gases, Inc.*, supra, at 8. This course of conduct goes to the claim that these proceedings were initiated as a fraud upon the court.

The second course of conduct was document concealment, disposal and destruction, necessary in order to leave no means of testing the accuracy of the customer database. This course of conduct is supported by the testimony of Patrick Tighe (Ex. 6, Angart document disposal), the statements of Suzanne Arena (Ex 7, emptying of the records room) Anthony Pressly (Ex. 19, Angart document disposal), Jonathon Caldwell (Ex. 20, Angart shredding), and Kirk Beck (Ex. 22, 1000-banker-box bonfire), and the email of Richard Anter and Natasha Brandt (Ex. 8, email regarding disposal of customer account reconciliation library.) It is further supported by the conduct of Brian Salvagni, who, knowing that documents were disposed not merely once, in March, 2003, but at least twice and likely more frequently, deliberately failed to disclose this to the Examiner when he was interviewed, Salvagni Statement to Examiner Docket Item No. 1630, June 2, 2003 at 78, l.19-79 l.7. Movant could not have known that this response was a failure to disclose until advised only recently by Patrick Tighe that he, Tighe, had told Salvagni of shredding in December, 2003, and could not have known it was deliberate until *United States v. Triana* 468 F.3d 308 (6th Cir., 2006.) was reported, in which Salvagni's behavior as an unindicted co-conspirator was described in detail, which behavior closely parallels his conduct with respect to the Examiner,

demonstrating that his failure to disclose the pattern of document disposal was not a mistake, see F.R.E. 404 (b).

The third course of conduct identified in the Motion was the manipulation of the tank count and the customer count in order to misrepresent the customer base of Level Propane so that the delivery of the going concern assets to the designated party, Horizon Propane, as a sharply and dishonestly undervalued entity would be credible to the Court. This course of conduct is supported by the Anter-Brandt email in which the removal of the customer account reconciliation library is discussed (Ex. 8), Suzanne Arena's Statement regarding the disabling of customer database, the customer tank database protocol (Ex. 15), the email discussing the customer tank shortfalls in 2003 (Ex. 16), Samantha Whitesal's statement regarding the customer records (Ex. 17), the Sues-Marwill email in which the severance of the customer database from the leased tank database is decided (Ex. 21), Suzanne Arena's statement regarding the Tank Recovery Committee (Ex. 18), all of which made possible the definition of a customer as one who purchased propane between November, 2002 and March, 2003, thereby reducing by at least half the number of customers counted, in defiance of the databases and industry practice, see the Sues email of January 23, 2003, Exhibit "B."

The fourth course of conduct is the waylaying of customer payment checks to Level Propane before its going concern assets were sold, and their subsequent negotiation after the going concern assets were sold by parties affiliated with the entity that purchased the going-concern assets. This is supported the Kessler Statement (Ex. 10) and the emails between Blair and Anter in which the mail collection procedure was changed so that the customer payment checks could be pulled from the morning mail

outside of Jeff Kessler's control as Cash Room Manager (Ex. 11, 12) from December 2002 onward. That the sort of heavy winter volume was hidden from the business while under this Court's jurisdiction and the Operating Reports made by Steven Sues since January 2003 were, by any reasonable inference, a regularly repeated fraud upon this Court that could not be uncovered so long as the management of Level Propane controlled all the records so that they could report what they chose to the Court. The purpose of this waylaying of customer payment checks was not mere theft, but to consolidate its fraudulent misrepresentation to the Court of the customer base as a means to credibly direct the going concern to Horizon Propane as strawman for Amerigas. The direction of the going concern assets to Horizon Propane is demonstrated by frustration of the Star Gas bid in the April, 2003 auction (Ex. 25, 26.) This entire exercise was designed to lend credibility to this scheme, so as to avoid a result such as occurred when the judge presiding over *In Re Tri-Cran, Inc*. 98 B.R. 609 (U.S.B.C., D. Mass., 1989) vacated the sale resulting from fraudulent collusion with officers of the court in the purchase of the business. Here, the pretense of an auction was designed to shield this transaction from a *Tri-Cran* scrutiny.

All of the post-petition courses of fraudulent conduct took place while the going concern of Level Propane was under this Court's jurisdiction and all were designed to exploit the statutory protections afforded by this Court's jurisdiction to advance a scheme whereby the going-concern of Level Propane was directed to Horizon Propane, as evidenced by the frustration of the Star Gas bid in April, 2003 (Ex. 25, 26), as Amerigas' strawman to place control of Level Propane's business model and satellite communication protocols in hands of those ready to restore the industry's *status quo* by

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suppression of Level Propane's business model. The authors of the Objection attempt to defeat the necessary legal result of this evidence by simply pretending that it does not exist.

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Collateral Estoppel cannot be applied to the Analysis of this Motion.

In the *Maloof v. Level Propane Gases, Inc., supra*, the District Court held:

> "The Court finds the *Hazel-Atlas* line of cases to stand for the proposition that where fraud on court can be proved, even a final judgment may be upset in the interest of justice," at 5.

The Court went on to say: "*Indeed, if Maloof's motion is denied even though it is supported by the evidence, this court will likely conclude that the Bankruptcy Court's decision was clearly erroneous"* at 6, emphasis supplied. Thus, District Court calls for proof of the fraud on the Court with *evidence*. This present Motion is distinguished from the June, 2006, Motion by the evidence upon which it relies, the courses of conduct that evidence shows, and the theory of the case that can account for these courses of conduct. The June, 2006 Motion had the Affidavit of Timothy Conklin regarding the frustration of pipeline allocation and the Verification of William Maloof as evidence. The District Court concluded that the fact relied upon to claim fraud on the court was the sale of the going concern assets, Opinion, *supra*, at 8.

By contrast, in the present Motion, four courses of conduct are described, all of which describe fraudulent conduct regarding Level Propane, and three of which describe such fraudulent conduct while Level Propane was subject to this Court's jurisdiction. Continuous fraud upon the Court was required to advance this scheme, including the filing of false Operating Reports in 2003, while the going concern assets were hidden prior to their sale. As the Movant gained a complete understanding of what transpired, his

theory of the case necessarily changed. To claim that this Motion is governed by the rules respecting the June, 2006, Motion is to maintain that the same evidence has been presented and that the same theory informs both Motions. Indeed this Motion was filed in response to the District's Court's direction to the Movant to file his Motion in the Bankruptcy Court since new evidence continued to flow in and the Movant could not build a record on appeal, *Maloof v. Level Propane Gases, Inc., supra,* Opinion at 5. No officer of the court can read the present Motion and claim in good faith that it simply repeats the Motion that preceded it. Because the evidence is demonstrably different and the theory is demonstrably different, the doctrine of collateral estoppel has no application to this case.

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When the Movant's Ability to Discover the Evidence Upon Which he Bases his Motion to Vacate has been Deliberately Frustrated, the Parties Responsible for that Frustration Cannot be Heard to Claim a Time-Bar.

As the terms of the Agreed Order on June 11, 2002 (Ex. 4) and Joe Gowan's statement (Ex. 27) bear out, the Movant was banned from the premises of the businesses that he owned and the employees of the businesses were forbidden to have any contact with him. That he had no access to any of the evidence upon which he premises his present Motion, but for the fortuitous remarks of Patrick Tighe and the discovery of the emails he has presented, negates any reasonable claim to this evidence was "available for years." Indeed, some of the evidence, such as Brian Salvagni's participation in Dr. Triana's Medicare fraud was not available until months ago, without which there could be no inference that Salvagni deliberately misdirected the Examiner.

Moreover, this Motion is premised upon fraud upon the Court, a deliberate use of the Court to achieve iniquitous ends by means of deceit of the Court on an ongoing basis.

Finally, the evidence here submitted falls squarely within the previously-quoted holding of Judge Aldrich who said:

> "The Court finds the *Hazel-Atlas* line of cases to stand for the proposition that where fraud on court can be proved, even a final judgment may be upset in the interest of justice," at 5.

Here Movant has shown evidence of fraud upon the Court, by the use of the Court's jurisdiction to advance a fraudulent scheme to direct the going-concern assets to those designated by the Bank Group in order to restore a *status quo* disrupted by Level Propane.

Conclusion

For all the forgoing reasons: that Movant has presented ample evidence of an ongoing fraud upon the Court, that the new evidence presented with the Motion led to discernment of four courses of conduct involving nine (9) officers of the court, that the District Court articulated the meaning of the *Hazel-Atlas* line of cases to which the present Motion responded, that the evidence presented with this Motion and the theory of the case arising from this evidence is clearly different from that in the June, 2006 Motion precludes the application of collateral estoppel, and that this Motion is brought within a reasonable time given the obstacles thrown up to thwart Movant in the discovery of the truth, your Movant prays that his Motion to Vacate be granted and for such other relief as is just in the premises.

Respectfully Submitted,

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SERVICE

I hereby certify that on this 15th day of October, 2007, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system

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/s/ David C. Eisler___________________________________

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