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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELANDIN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

**SHAREHOLDER'S MOTION TO VACATE PURSUANT TO R. 60(b)(2) THE
COURT'S DECISION OF FEBRUARY 28, 2008 DENYING MOTION TO
VACATE AGREED CONVERSION ORDER AND SALE ORDER
(Docket Item Nos. 3253 and 3254)**

Now comes William H. Maloof, sole shareholder of the asserted Debtors, by and through counsel undersigned, and for his Motion to Vacate the Court's decision of February 28, 2008, Docket Item Nos. 3253 and 3254, which Motion is made pursuant to R. 60(b)(2) F.R.C.P., states as follows:

STATEMENT OF THE CASE

Your Movant has now discovered and authenticated email evidence, attached as the Exhibits to this Motion (Ex. 1-A through 1-G,) with an affidavit of Jonathan Caldwell concerning the chain of custody of the media in which the emails were found (Ex. 2) shedding additional light on the scheme that has resulted in the fraudulent June 6, 2002 involuntary bankruptcy petition against Level Propane in which proceedings it was stripped of its going-concern assets and by means of which the Movant was stripped of control of his company. These emails make it explicit that a conspiracy existed months before the involuntary petition was filed, which continued as the bankruptcy advanced toward disposal of the going-concern assets, and that conspiracy achieved both its immediate object of concealing tens of millions of dollars of customer payments and the ultimate object, in concert with the efforts of others, of ousting the Movant from control of Level Propane.

The device used by the conspirators was almost juvenile in its simplicity: the concealment of customer payment checks to fraudulently misrepresent a reduced cash flow for the going concern. This simplicity assured the scheme's success. John Verbos, at times the Chief Information Officer of Level Propane and at others its President, stated in his email of December 15, 2001, to "DA:"

"Dick,

"I have an idea that will speed up the process on obtaining the company from BM. *We just need to hold some checks back starting late December till he goes under.* How does that sound?

JV," Exhibit 1-A, Email Exchange Between JV and DA 12/15/2001, emphasis supplied.

This notion was actually executed over the ensuing weeks:

" Dick,

"Just an update on our plans for the new company. I have been taking check for a few weeks now, and BM has no idea what I have been doing. *I have several checks put in a safe place and when the time comes, we will add them back in.* Do you think we need to do more with this or just continue down the same path? Please let me know soon if I need to change anything such as the amount of checks or the type of checks.

"Look forward to lunch with you soon.

"JV," Exhibit 1-B, Email Exchange Between JV and DA, 1/19/2002, emphasis supplied.

Verbos continued to hold back checks, in a short time accumulating a sufficient cache of hoarded customer payments to financially choke the going concern:

"Dick,

"Just an update on how we are doing. *BM is losing money and he does not understand why. This plan is flawless. I have held several thousand checks worth a lot of money.* We will look like geniuses.

"See you at lunch tomorrow.

“JV,” Exhibit 1-C, Email Exchange Between JV and DA, 2/13/2002, emphasis supplied.

The effects of Verbos’ fraudulent check-hoarding were soon palpable as what ought to have been a solvent going concern was losing money, much to the delight of the conspirators:

“Dick,

“I wanted you to know that I just got out of BM’s office, and *he is really worried and scared that he is going to lose Level*. I see he is scare as hell and I don’t give a shit about him anymore. *I just can’t wait until they take his company away from him and allow us to take it over*.

JV, Exhibit 1-D, Email Exchange Between JV and DA, 3/27/2002, emphasis supplied.

To which DA replied:

“John,

“No kidding. I wish I could have been there to see that. *I cannot wait until the day he is gone and we are running the company*. The look on his face when they take away his company will be priceless. *What is the status on the checks you are holding* and is there anyone else there that might be able to help us get him out faster? I know at one time you were going to talk to the drivers or some of the customer service representatives? Did that ever pan out?

“DA,” Exhibit 1-D, emphasis supplied.

It is clear that by now this conspiracy is established, effective, and moving toward its object. The next email available to the Movant discloses that Verbos, having held back the checks, is looking to Dick for advice as to when to restore this concealed hoard of customer checks to the cash flow of the going concern, “Jeff K.” is the very Jeff Kessler who has stated that winter volume checks were deposited in the accounts of Horizon Propane in the summer of 2003 (Ex. 3), after the going concern assets were conveyed out of Level Propane by the Sale Order:

“Dick,

“I wanted you to know when do you think we should start adding back in these checks? Jeff K. will not know the difference and I can change some dates to make it look really good. What are your thoughts on when this should happen?”

“JV,” Exhibit 1-E, Email Exchange Between JV and DA, 5/16/2002

This email was sent to “DA” a scant three weeks before the involuntary bankruptcy petition, but while John Rudd, installed at the insistence of and reporting to the Bank Group pursuant to the March, 2002 Forbearance Agreement, was the Chief Restructuring Officer. The next email exchange to come to attention of the Movant is an exchange between Verbos and Dick after the involuntary petition has been filed and the Bankruptcy Estate has been established:

“Dick,

“Just to let you know, we have cashed about 5% of the checks so far. I think we need to speed up this process. What are your thoughts?”

“JV”

To this question “Dick” replies with consternation, lest the diversion scheme be so successful that the going concern appear moribund, that the restoration of the checks needed to occur at a faster rate:

“John,

“I would have thought by now that we would have had more checks cashed. *We really need to speed up this process so we will look like a company that is not going to fail but a company that will succeed with a little investment from our friends.* Let me know sometime next week how we are doing. Also, do you think that Jeff K. needs some help with the check processing?”

“DA,” Exhibit 1-F, Email Exchange Between JV and DA, 7/31/2002, emphasis supplied.

The conspirators close down their email correspondence, having successfully concluded the first phase of the scheme with the following exchange:

“Dick,

“I don’t want to send anymore emails and I am going to get rid of the ones that I have sent and received from you to this point about this. *We are close to having the process completed and I want to make sure that my cut is coming soon.* Please update me on when I will receive this.

“JV”

To which “Dick” replied:

“John,

“Your cut will be coming soon and I agree that we should only take face to face from now on. I don’t want anyone to find this out and for this to come back and bite anyone of us in the ass. Set up some meetings over the next couple of days so we can meet. *As for your cut, it will be coming in the next few days. Thanks for all that you have done to help us out.*

“DA” (Exhibit 1-G, Email Exchange between JV and DA, August 15, 2002), emphasis supplied.

This last exchange discloses that both Verbos and “Dick” knew that their scheme was unlawful, that it was a significant contributing pretext for the involuntary bankruptcy of the Movant’s companies, including Level Propane, and that Verbos expected a quid pro quo for his participation in this unlawful scheme. Verbos engaged in a scheme to conceal and then delay the introduction of these customer payments to the cash flow of Level Propane. This was active interference with the visible cash flow of Level Propane in order to misrepresent its balance sheet and profit-and-loss statement to steal the company itself. It is no mistake that Verbos insisted on a \$2M “key man” life insurance policy, with his wife, not Level Propane, as beneficiary, despite his insistence that he was no employee of Level Propane but only an independent contractor, in February, 2001, knowing that he was about to join league with well-heeled and well-known hoods (Ex. 4.)

This scheme was a fraud brought into the Bankruptcy Court by officers of the court, John Verbos and Dick Anter, as defined by *In Re: Intermagnetics (Intermagnetics v. CITIC)* 928 F.2d 912 (9th Cir., 1978), *Demjanjuk v. Petrovsky* 10 F.3d 338 (6th Cir., 1993), and *In Re: Tri-Cran* 98 B.R. 609 (U.S.B.C., D.Mass., 1989) who acted corruptly to perpetrate a fraud upon the court, which fraud was coordinated with the frauds of other officers of the Court, notably Jeff Marwil, and Baker & Hostettler, which frauds maintained at the behest of the lead creditors, the Bank Group, through BT Commercial Corp and its management, particularly Wayne Hillock. Further, by misrepresenting the cash-flow of Level Propane with the purpose of advancing a fraudulent misrepresentation of its insolvency, Mssrs. Verbos and Anter acted in clear violation of 18 U.S.C. Sec. 1503, in their bringing corrupt influence to bear on an officer of the court, to wit, the Bankruptcy Judge himself, which corrupt influence was compounded by the bringing to court of a scurrilous, scandalous and defamatory publication, the article in the Cleveland Free Times, see Ex. 5, Affidavit of William Maloof, under the guise of a narrative of the poor customer sales practices of the business, when a centerpiece of the article was an accusation of morally reprehensible criminal conduct on the part of the Movant, which article was calculated to demonize the Movant.

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The Check Concealment Scheme and the Scheme of the Bank Group

This criminal check concealment scheme coordinated with the scheme of the Bank Group, an initial step of which was “poison the well” as to the Movant, and thereby to altogether isolate the Movant from all of the parties to the bankruptcy by means of the above-described scurrilous, scandalous personal defamation attached as an exhibit to the First Day papers. It further coordinated with the criminal scheme of the Bank Group by which the Bank Group, having demonized the Movant, and making this demonization known to the Movant, railroaded

the Conversion Order of June 11, 2002, by which the unlawful seizure of the share voting rights made a few days previously, on June 6, 2002, were legitimized, Charles Sweet was installed as the sole Director of the corporations, and the Movant was banished physically from the premises of his own businesses. It further coordinated with the Bank Group's scheme, through its counsel Jeff Marwil, who acted forcefully, at the direction of Wayne Hillock, famously of the former Bankers' Trust, now BT Commercial Corp., to see to it that the fiscal affairs of Level Propane went unexamined by the cancellation of the Rule 2004 Examination (Ex. 6) that would have revealed the true history of Level Propane and that would have established its true asset-value, with nearly 80,000 leased-tank customers, each reasonably worth \$3,500.00, and tens of thousands of customer-owned tank customers, each reasonably worth \$1,200.00, to say nothing of the computer system, for which Verbos was a mere mechanic (the touted BV Module was nothing more than a line of code); to keep the going concern assets under the control of the Bank Group, so that the Bank Group could direct the disposition of the going concern to Horizon Propane by means of the rigged second auction and the resulting the Sale Order, by frustration of the first auction by a.) the abandonment of a stalking horse, so no bidding floor was set for the auction (Brokmond Interview, Ex. 7) and b.) the cancellation of the auction on the pretext of a lack of bid deposits when the bid deposits could not be made as a result of the wiring instructions' tardy transmittal to the bidders (Brokmond Interview, Ex. 7); and the de-coupling of the customer database and the customer tank database in January, 2003 (Sues-Marwil email exchange, Ex. 8.)

By means of the Bank Group's conduct, control of the going concern assets were retained in the Bankruptcy until they could be effectively directed to Eaglerock in April, 2003 resulting in the sale of the going-concern assets to Eaglerock on June 27, 2003. During the time the going

concern was retained in the Bankruptcy, still more tens of millions of dollars in customer check payments were concealed in order to suppress the customer count, since the customer database had been disabled, and to continue the misrepresentation of the cash-flow of the going-concern in order to frustrate the second auction. The fervent support of the sale of the going concern by the Bank Group, the guarantee by the Bank Group of the payment to John Verbos for release of the rights to the "BV Module," which was no more than a single line of code, and its unreserved support for the asserted Debtors' plan for reorganization all indicate the Bank Group's posture regarding the sale of the going-concern assets and the protection of those involved in the coordinated schemes, including the check concealment scheme of Verbos and Anter.

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Himmelman and the Check Concealment Scheme

When Walter Himmelman sent his email to John Rudd, which explicitly discussed the ouster of the Movant from Level Propane, in April, 2002, he was no longer an employee of Level Propane, having resigned his position as Controller in favor of Terry Kneisel, one of his staff subordinates, at the end of February, 2002, shortly before the Forbearance Agreement was put in force by the Bank Group. By installing Terry Kneisel, who had no experience as a controller, indeed neither the training nor the experience beyond that of basic accounting, Himmelman abetted Verbos' check concealment scheme by putting in the position of ultimate responsibility a person whom Himmelman could be confident would not be equipped to follow the money or maintain such cash control procedures that did exist at Level Propane.

Himmelman has since been protected so that his silence regarding the sabotage of Level Propane would be maintained, indeed, those in control of the transaction, as a concomitant result of the settlement of *Level Propane Gases, Inc. v. Maloof*, Case No. 04-1300 (U.S.B.C., N.D.O.,) assured his silence with a \$1.5 Million settlement. The settlement provided, among other terms,

that Himmelman reserved the right to enjoin the Movant, who is a co-defendant in this adversary proceeding, from seeking his testimony or maintaining any claims against him. A prior attempt to build injunctive relief in Himmelman's favor into the settlement failed when this Court recognized that such terms would exceed its jurisdiction.

Himmelman was covered by a policy re-issued, after its final term had lapsed, under circumstances like that of a lapsed fire policy renewal issued as the building insured was burning to the ground, part of this scheme. The use of such a policy as a vehicle to purchase Himmelman's silence as to his part in this scheme has made the issuer of the policy, AIG, whose founder, Hank Greenberg, put AIG directly and heavily into the gas fuels and propane markets and was beholden to the banking industry for his business, and who over-extended its risks with new and novel re-insurance frauds. Only by its immediate action to recognize that the policy was of no force and effect and its recovery of the monies paid out as legal fees to date, can AIG pull itself out of the scheme. Failing to do so keeps AIG in the scheme, and it will be pursued as a co-conspirator, all the way to the auction on the courthouse steps if need be.

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Jacobs and the Check Concealment Scheme

These newly discovered emails make it absolutely unmistakable that the apparent failure of Level Propane in the 2001-2002 heating season was an illusion deliberately effected by means of determined conspirators bent on taking control of Level Propane away from the Movant. For the apparent financial weakness of Level Propane as a going concern in the months prior to the involuntary petition, no one need look farther than John Verbos, the CIO and later President of Level Propane, and Dick, who, on information and belief is none other than Dick (Richard) Anter, who was the president of Level Propane while Eaglerock managed its affairs under Bankruptcy jurisdiction. The existence of this pre-petition scheme effected by Verbos and Anter,

sponsored and directed by those to whom Anter reported, who had assured Verbos of his “cut” can lead only to Eaglerock’s owners, Richard Jacobs and his investment group.

LAW AND ARGUMENT

-1-

The Evidence Submitted Satisfies All of the Requisites Under R. 60(b)(2) by which a Judgment Must be Vacated.

This Motion is brought under R. 60(b)(2), F. R. Civ. P., by which your Movant seeks a reconsideration of the Court’s February, 2008 denial of his Second Motion to Vacate in light of this newly discovered evidence. The evidence as it stands is all but conclusive, see *Ferrell v. Trailmobile, Inc.* 223 F.2d 697 (5th Cir, 1955), and no pretext can be found by which to disregard it. This new evidence, recently discovered by the Movant, demonstrates conclusively that a criminal conspiracy existed and that the conspiracy was directed not only to pushing the Movant out of his own business, exactly the sort of conduct condemned by the court deciding *In Re: Landmark Distributors*, 189 B.R. 290 (D.N.J., 1995), in which an involuntary bankruptcy was controverted because its sole purpose was to put the asserted Debtor, Landmark Distributors, out of business. In the present case, the Bank Group and its allies interfered with the Court’s operations in order to use the Court as a vehicle by which to achieve that same end. This fraud parallels *Root Refining Co. v. Universal Oil Products Co.* 169 F.2d 514 (3d Cir, 1948) more than even *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 206 (1944), because while *Hazel-Atlas, supra*, turned on a single fraudulent act, a phony trade magazine article, *Root Refining, supra*, turned on a well articulated scheme that involved ongoing influence peddling and bribery of a federal judge by a close friend who was hired by Universal Oil for the sole reason he could get close enough to the judge to bribe him. Conduct of officers of the court, even before Level

was pulled into bankruptcy, that created the fraud and those officers committed their fraud as false promises to the court. In this case, as in *Root Refining*, the fraud was not a single act, but a well articulated and ongoing scheme to destroy the Debtor under the cover the very Bankruptcy administration in which it was to be reorganized.

A Motion to Vacate pursuant to R. 60(b)(2) based on newly discovered evidence may be made even where there is an appeal pending, see *Ferrell, supra*. The evidence here presented clearly is sufficient to vacate, pursuant to R. 60 (b)(2). In *United States v. McGaughey*, 977 F.2d 1067 (7th Cir, 1992), the court articulated an eight fold test for evidence on which a court would grant a motion under R. 60(b)(2):

- “1) the evidence was in existence at the time of trial or pertains to facts in existence at the time of trial;
- “2) it was discovered following trial;
- “3) due diligence on the part of the movant to discover the new evidence is shown or may be inferred;
- “4) the evidence is admissible;
- “5) it is credible;
- “6) the new evidence is material;
- “7) it is not merely cumulative or impeaching; and, finally,
- “8) the new evidence is likely to change the outcome,” at 1075.

Here, when the Motion to Vacate was filed, 1.) the Verbos emails articulating the conspiracy to conceal the customer checks had been existence since 2001, 2.) these emails were discovered by the Movant within the last several weeks and fully authenticated only within the past two weeks, 3.) the Movant had learned of these emails from a party, Jonathan Caldwell, who found them only weeks prior, and with whom the Movant had been in contact concerning the case for some time, 4.) this evidence, the authenticated emails, is clearly admissible, 5.) the new evidence is clearly material, in that it demonstrates clearly that those managing the affairs of the Debtor, as officers of the court, conspired to seize control of the company from the Movant acted in clear detriment to the interests of the asserted Debtors and its other creditors, 6.) the evidence further

demonstrates the ends to which those managing the affairs of the Debtor would go in order to achieve their object, and was entirely consistent with their compromise of the customer database and concealment of the hard-copy customer records, 7.) the evidence, showing actual interference with the cash flow of Level Propane by those charged with its management, is evidence of an independent wrong necessary to maintain the pretense that Level Propane had lost customers, when in fact the customers were hidden, 8.) by making the outrages described previously concrete and identifiable as part of a single, coordinated, scheme to seize control of Level Propane from the Movant, this evidence is likely to change the outcome of the litigation, see *McGaughey, supra*.

The cases that define fraud upon the court, which constitutes the background of this motion, all bear the common hallmarks of corruption and concealment. In *Hazel-Atlas, supra*, the corruption was the publication of a specious article supporting the novelty of a patent claim authored by the claimant's counsel and published under the name of a trade union president, the concealment was that of the identity of the article's author. In *Root Refining Co., supra*, the corruption was the payment of money to an appellate judge for an opinion favorable to a patent claim, the concealment was of that payment. In *Demjanjuk v. Petrovsky, supra*, the corruption was the maintenance of Demjanjuk's identity as "Ivan the Terrible," the concealment was that of statements that clearly identified "Ivan the Terrible" as another man entirely and of statements entirely inconsistent with Demjanjuk's identity as "Ivan the Terrible." In *Intermagnetics, supra*, the corruption was the rigging of an undisclosed sale of the debtor's going-concern assets at a steep discount to their true value to the principal of the debtor, and its subsequent sale by debtor's principal to a third party at a 400% mark-up, the concealment was that of the identity of the purchaser, the debtor's principal, held out to the court as an independent third party. In

Southerland v. County of Oakland 77 F.R.D. 727 (USDC Mi., ED, 1978) the attorney representing the plaintiff as wife and guardian of a man critically injured by the excessive use of force by a police officer, misrepresented in open court to the Court, the insurance carrier for the Defendant, his own client and the State of Michigan that he would reimburse the medical expenses paid by the Michigan Department of Social Services out of his fee in the settlement of her claims and refused to do so continuously for two and a half years. The corruption was in the attorney's manipulation of the terms of the settlement to exclude the State of Michigan, the concealment was of his intention never to pay that bill.

Here, the corruption is the use of the bankruptcy court to seize control of the present Debtors in order to sever the shareholder from any control of the Debtors, the concealment of the customer checks paid to Level Propane, as a means to drive it into bankruptcy and, once in bankruptcy, to misrepresent its going-concern value, the Debtors and direction of the going-concern assets to an insider by means of a rigged auction, in order to banish the shareholder entirely from the propane industry, in which Level Propane had been the eighth largest retail vendor, on a trajectory to become the industry's largest propane retailer, without resort to acquisitions, but solely on its internal year-to-year growth. There can be no doubt that Verbos, Anter and his sponsors, and the Bank Group held the common purpose of ousting the Movant from control of Level Propane. Walter Himmelman's April 14, 2002, email concerning his consulting agreement to John Rudd (Ex. 9), the "Chief Reorganization Officer (CRO)" installed by the Bank Group as the centerpiece of the March 7, 2002, Forbearance Agreement (Ex. 10), set out the consensus of those allied against the Movant when he said:

"Bill could no longer be involved. Eventually the Banks will take him out entirely in order to complete a transaction. . . . As you are well aware, the main objective of Bill is to 'Drive a wedge between yourself and the Banks' so he could regain control of the company. I agree this will never happen."

In this statement Mr. Himmelman observes that, as of April, 2002, the Bank Group wanted the Movant out of control of Level Propane, that Rudd reported to and acted under the direction of the Bank Group, and that the Movant would never regain control of Level Propane. Thus, while the first phase of the check concealment scheme of John Verbos, Anter, and Anter's sponsors was peaking, Walter Himmelman stated to John Rudd, the CRO installed by the Bank Group, that their common object of was the ouster of the Movant. The check concealment scheme had as its explicit object the hastened ouster of Movant, as when Verbos states: "*I just can't wait until they take his company away from him and allow us to take it over*" on March 27, 2002. That the Bank Group sought to wrest control of Level Propane from the Movant is clear from the fact that the March 7, 2002 Forbearance Agreement, stripped the Movant of operational control of Level Propane while the check concealment scheme was ongoing. It is simply inconceivable that the parties with the common object of ousting Movant would not communicate concerning their respective efforts to assure that ouster. It is likewise inconceivable that the Bank Group, whose business is money, would fail to notice that millions of dollars in customer payments were missing after they had been booked unless they turned a deliberate blind eye to their concealment, and in so doing endorsed and ratified that concealment and its purpose.

At its most immediate and concrete, there was the scheme to conceal customer payment checks so that Level Propane could be misrepresented as insolvent. More removed from the operation of Level Propane was the concealment of the Bank Group's role as an architect of this corrupt plan to drive Level Propane out of the industry and of Amerigas as the ultimate repository of Level Propane's going-concern assets. It is inevitable that two stories must be told: that of the corruption and that of the concealment. The depth of the corruption of the bankruptcy system emerged only as, by dint of the shareholder's unremitting efforts and by dint of

opportunities relentlessly pursued, the concealment of the corrupt scheme was gradually unwound.

This new evidence, the Verbos check concealment emails, is likely to change the outcome because it sets out in such clear and unmistakable terms the existence of the scheme alleged. In so doing, it draws together still more tightly all of the other evidence gathered and presented to date. In light of this newly discovered evidence, it is no longer possible to argue that Bank Group was simply responding in a businesslike manner to the deteriorating condition of a borrower. The very John Rudd, installed as the CRO When this Court has previously rejected the probity of the email exchange between Richard Anter and Jamez Blair, in which Anter instructed Blair to continue to pick up the mail, this exchange takes on a whole new import in the context of an existing conspiracy to conceal customer payments in order to misrepresent the cash-flow of the company to hasten the seizure of control from the Movant. While this Court has declined to address the statement of Jeff Kessler (Exhibit ***), in which he described the delivery of thousands of customer checks from the winter to the cash room during the summer of 2003 *by John Verbos*, after the going concern assets had been transferred to Eaglerock Propane, owned by Richard Anter's sponsors, the Jacobs Group, by means of the Sale Order, and has likewise declined to address the affidavits of Suzanne Arena (Exhibits ***), *who reported to John Verbos*, the discovery of these emails makes it mandatory to address them, as part of the same scheme to conceal the going-concern value of the companies by distorting the customer count. Similarly, the Sues-Marwil exchange (Exhibit 8), viewed in light of these Verbos emails, cannot be set to one side, but, in light of the established scheme to conceal the customer payments, must be analyzed in terms of a coordinated scheme to conceal the value of the going concern by concealing the true customer and tank count.

Turning to the Verbos email exchanges themselves, they clearly reflect the existence of an ongoing criminal conspiracy the purpose of which was to seize control of Level Propane from the Movant. This conspiracy began prior to the bankruptcy and progressed as these bankruptcy proceedings continued and the going concern assets of Level Propane, were delivered to Eaglerock Propane by the Sale Order. This conspiracy was integral to the initiation of the bankruptcy in that it corruptly misrepresented Level Propane as a financially weakened enterprise by concealing actual customer payments and keeping these payments out of the visible revenue stream, thereby providing the Bank Group a pretext to insist on the Forbearance Agreement and within months after that, a pretext for an involuntary bankruptcy. Finally, the continued concealment of the checks was the scheme around which all of the other out-of-court misconduct, including the compromise of the customer database and the tank database, was wound like wire on the armature of an electric motor.

-2-

The Conduct Shown by the Evidence was a Fraud Upon the Court is an Injury to the Court Itself and its Processes that Requires that the Judgment in Issue be Vacated.

A fraud upon the Court is an injury to the court itself. In the words of *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir., 1998), whatever diligence the moving party exercised, “the district court was empowered to set aside the verdict, *as the court itself was the victim of the fraud,*” at 1133, emphasis supplied. The observation of the *Pumphrey* Court is made also by the Court deciding *In Re Levander*, 180 F.3d 1114 (9th Cir. 1999) when it pointed out that the material fact was that the *Court* was deceived by the false testimony it had no reason to question that property of the estate had been sold when it had been retained through a nominee: “neither the Levanders *nor the court* had any reason to question the Corporation with respect to whether the Corporation still possessed its assets,” at 1120. Similarly, in *Demjanjuk, supra*,

essential to the decision of this Circuit was the fact that the Court had been deceived because the concealment by government lawyers vital interfered with the Court's ability to function as a court as it was called upon to assess the issue of Demjanjuk's identity as "Ivan the Terrible:"

"What *neither Judge Battisti nor Demjanjuk's counsel knew* was that the contemporaneous reports of the 1979 Horn interview by the OSI investigator and historian directly conflicted with Horn's testimony at the deposition that when he finally identified Demjanjuk's photograph in the second spread he could not see the first set of pictures," 10 F.3d at 351¹.

Similarly, the sale of the going-concern assets of the Debtors to a shell corporation owned by its principal was vacated when *the principal lied to the court* that the price paid for the going-concern assets was the highest that could be obtained, when he immediately sold it to a Chinese state corporation for five times the amount and his purchase had been funded by the Chinese state corporation, *In Re: Intermagnetic, supra*. Finally, in *Hazel-Atlas, supra*, a challenged patent infringement judgment was vacated because it was the Court that had been deceived by a false statement in the underlying patent made nearly ten years before, not the party opposing the patent infringement action. In all of these cases, the fraud on the court that resulted in the vacation of the challenged judgments was just that: *a fraud on the Court*. In each instance, it was the damage done to the Court's processes that was at stake.

These Orders subject of Appellant's Motion to Vacate arose as the Court's ratification of agreements between the asserted Debtors and the Bank Group, to advance the scheme that placed the going concern in the hands of Horizon Propane as the straw man for Amerigas.

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- 1.) The criteria applied by our Sixth Circuit to identify fraud on the court in *Demjanjuk, supra*, were as follows:
"the elements of fraud upon the court as consisting 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;
 5. That deceives the court," 10 F.3d at 348.

In the first instance, the Conversion Order, officers of the court, including BFCA and Jeff Marwill, represented to the Court that the conversion's purpose was to preserve and protect the businesses, when in fact, its purpose was to continue the Bank Group's control of the companies they pulled into involuntary bankruptcy, itself premised on a fraudulent representation that Level Propane was insolvent when millions of dollars of customer payments had been concealed by Verbos in concert with Anter and his sponsors, rather than give the control over to an independent Chapter 7 Trustee. In the second instance, the Sale Order, the frauds carried into Court were that (1) Level Propane had fallen into hopeless default, when in fact millions in cash customer payment were hidden (Ex. 1-A through 1-G, Motion to Vacate Docket Item No. 3140, Ex. 10, 11 and 12), that (2) there had been a true auction when competing bids had been deliberately frustrated (Star Gas emails, Motion to Vacate, Docket Item 3140, Ex. 25 and 26) and that (3) the customer count had been deliberately misstated and the means to verify the customer count either taken off-premises or destroyed (see e.g. Motion to Vacate, Docket Item No. 3140 Ex. 7, 8, 21 and 22), which could only have been accomplished with the Bank Group's continued domination and control.

The Conversion Order was thus the means by which the Bank Group could maintain complete control over Level Propane so that it could direct the going concern to Horizon Propane in the guise of a sale. Horizon Propane promptly conveyed the going concern to Amerigas, indeed, on October 3, 2003, perhaps as quickly as the transaction documents could be drafted. As in *Levander, supra*, the Court took first the Conversion Order and then the Sale Order at face value, having no means and no reason to question either of them, having no means to test the truth of the claims supporting either Order. The Movant, in like manner, had not the means, that is to say the facts at hand, to question either of the Orders. Similarly, in *Pumphrey*,

supra, following the holding of *In Re: Intermagnetics, supra*, fraud on the court was found as a result of conduct occurring outside of court. This case concerned a wrongful-death claim resulting from product defects, in which the plaintiff's decedent was killed by the discharge of a gun due to failure of the gun's safeties when he dropped it. The Defendant's vice-president and general counsel concealed a video recording of a drop-test of the gun during which test the safeties failed, disclosing to the Plaintiff and *to the court* only the video recording in which the gun safeties worked in the drop-test. Because he was corporate counsel for the Defendant, had framed the Defendant's discovery responses, and held both the video recordings of the gun's drop test, he was ruled an officer of the court despite the fact that he had not entered a notice of appearance in the litigation, nor was admitted to the court in which the trial took place, *Pumphrey, supra*, 62 F.3d at 1131-1132.

Exactly the same sort of fraud infected *In Re Tri-Cran, Inc., supra*, in which the purchaser of the business colluded with officers of the Court, the Debtor-in-Possession's counsel and the officer of Debtor-in-Possession, to obtain the business for a fraction of its true ascertained value and he and the officers of the court with whom he colluded before the Bankruptcy Court to conceal their out-of-court collusion. The newly discovered evidence presented here demonstrates that the scheme to dominate Level Propane was actively pursued prior to the involuntary petition, and that the involuntary petition was filed and maintained in furtherance of that existing scheme, as were the challenged Orders, which themselves became instruments of fraud.

CONCLUSION

Because the evidence presented with the Motion demonstrates that the Agreed Conversion Order and the Sale Order were products of fraud upon the court and continue to

operate as an instrument of fraud upon the court, this Court is bound to vacate its previous order in light of this all but conclusive evidence, by which officers of the court discuss in writing the means by which they will effect a fraud upon the court as they are perpetrating the fraud. There can be no stronger evidence than such admissions, admissions that bind all of the schemes into a single coordinated effort to seize and maintain control of the asserted Debtors from the Movant using this very Court as their instrument. For all of these reasons, the Movant urges this Court to grant this Motion made pursuant to R.60(b)(2), reconsider its prior decision of February 28, 2008 and vacate the Agreed Conversion Order and the Sale Order as products of frauds upon the court.

Respectfully Submitted,

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SERVICE

I hereby certify that on this 18th day of June, 2008, 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.

/s/David C. Eisler

David C. Eisler, Counsel for the Appellant