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CLERK U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

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

In re:	)	Chapter 11
	)	
LEVEL PROPANE GASES, INC., <i>et al.</i> ,	)	Case No. 02-16172
	)	Jointly Administered
Debtors.	)	
<hr/>		JUDGE: RANDOLPH BAXTER

**DEBTORS' OBJECTION TO TAL FINANCIAL CORPORATION'S (I) MOTION  
TO VACATE AGREED CONVERSION ORDER, ORDER APPROVING  
EAGLEROCK MANAGEMENT AGREEMENT, ORDER APPROVING  
POST-PETITION FINANCING AGREEMENT, ORDER APPROVING  
GLOBAL SETTLEMENT, AND ORDER APPROVING SALE OF THE  
GOING CONCERN ASSETS OF LEVEL PROPANE AND (II) REQUEST  
FOR EVIDENTIARY HEARING OF SUCH MOTION**

**I. Introduction**

Level Propane Gases, Inc. ("Level Propane"), and its affiliated debtor entities, debtors and debtors in possession herein (collectively, the "Debtors"), hereby object to the motion (Dkt. No. 3449, the "Motion") of Tal Financial Corporation ("Tal") to vacate five orders entered by this Court during 2002 and 2003 (the "Challenged Orders").<sup>1</sup> In seeking such relief, Tal relies entirely upon arguments and allegations previously presented by William H. Maloof ("Maloof"), merely incorporating by reference Maloof's prior motions and briefs and then arguing that the Court's rejection of those attempts to unravel six years of proceedings should not apply to it;

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<sup>1</sup> The Challenged Orders are: (i) the Agreed Order entered June 11, 2002 (Dkt. No. 5) (the "Conversion Order"); (ii) the order entered October 17, 2002 (Dkt. No. 676) approving the management agreement between Eaglerock Propane and Level Propane (the "Management Order"); (iii) the order entered October 17, 2002 (Dkt. No. 679) amending the final order authorizing the Debtors to enter into a post-petition financing agreement (the "Amended Financing Order"); the order entered June 20, 2003 (Dkt. No. 1667) approving the global settlement between and among the certain of the Debtors, the so-called "Bank Group," the Equipment Financiers and the Official Committee of Unsecured Creditors (the "Global Settlement Order"); and the order entered June 27, 2003 (Dkt. No. 1721) approving the sale of the going concern assets of Level Propane (the "Sale Order").

indeed, it admittedly makes the Motion based solely on information supplied to it by Maloof. Separately, it has requested that the Court schedule an evidentiary hearing on the Motion (Dkt. No. 3437, the “Hearing Request”), seeking to present, in part, the same “evidentiary” submissions previously proffered by Maloof and found by the Court as offering “no support for his vague conspiracy allegations.” (Dkt. No. 3253, Memorandum of Opinion and Order filed February 23, 2008 (the “February 28 Opinion”) at 10.)

This obvious attempt to circumvent the Court’s prior rulings on Maloof’s motions<sup>2</sup> and somehow undo six years of proceedings must be rejected. Tal has failed to show that it is entitled to the requested relief pursuant to Fed.R.Civ.P. 60(b)(6). Moreover, the Motion is clearly time-barred under both the “reasonable time” requirement of Fed.R.Civ.P. 60(b) and the doctrine of laches. Accordingly, the Debtors respectfully urge that the Court deny and dismiss the Motion and the Hearing Request.

## **II. Law And Argument**

### **A. The Motion fails to set forth grounds for relief under Fed.R.Civ.P. 60(b)(6).**

Tal purports to bring the Motion pursuant to Fed.R.Civ.P. 60(b)(6). Although repeating the mantra that Maloof’s prior submissions to the Court somehow evidence a “fraud upon the Court” and therefore justify relief from the Challenged Orders under the Rule’s “catchall” provision, it offers no analysis substantiating this assertion. Indeed, the Court has previously

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<sup>2</sup> The Motion not only relies almost entirely on Maloof’s arguments and “evidentiary” submissions, it is a virtually word for word replication of the motions to vacate filed on behalf of Joanne Brezic and Ohio Truck & Trailer, Inc. in the prior two weeks, even repeating their mistaken citation in the Motion’s title to the non-existent “Bankr. R. 9044.” As discussed *infra*, Maloof’s attorney, David Eisler, previously filed a notice of appearance on behalf of Tal in this case. (See Dkt. No. 3000, Notice of Appearance filed August 7, 2006.) Unfortunately, in their apparent desire to obscure Tal’s status as a proxy for Maloof, they had the Motion filed over the signature of an attorney who, to the best of the Debtors’ knowledge, does appear to be admitted to practice in this district.

found that the “evidence” upon which it substantially relies “fail[s] to demonstrate fraud upon this Court.” (February 28 Order at 11.) Tal’s attempt to re-litigate this contention based on allegations of new and additional “evidence” must be rejected.

“[R]elief under Rule 60(b) is ‘circumscribed by public policy favoring finality of judgments and termination of litigation.’” *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Waiferson Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)). “This is especially true in an application of subsection (6) of Rule 60(b), which applies ‘only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.’” *Id.* (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). The movant must therefore prove “something more” than the grounds for relief otherwise enumerated in the Rule, including “unusual and extreme situations where principles of equity mandate relief.” *Olle*, 910 F.2d at 365 (emphasis in original). Such proof must be by clear and convincing evidence. *Info-Hold, Inc., v. Sound Merchandising, Inc.*, \_\_\_ F.3d \_\_\_, 2008WL3823045, No. 07-4238, slip op. at 5 (6th Cir. August 18, 2008).

Tal clearly has not and cannot meet this burden. As the Debtors have previously observed in response to Maloof’s identical arguments, a movant is required to prove five elements to establish a “fraud upon the court”:

- (1) conduct on the part of an officer of the court;
- (2) the conduct is directed at the “judicial machinery” itself;
- (3) the conduct consists of intentionally false statements;
- (4) the false statements are averments or concealments when under a duty to disclose;
- (5) the false statements actually deceive the court.

*See, e.g., Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001); *Alley v. Bell*, 405 F.3d 371, 373 (6th Cir. 2005). “[T]hese elements . . . require that the individual accused of perpetrating the fraud have directly interacted with the court to ‘prevent an adversary from presenting his case fully and fairly.’” *Computer Leaseco, Inc. v. NTP, Inc.*, 194 Fed. Appx. 328, 338, 2006 WL 2572057 at \*10 (6th Cir. Sept. 6, 2006) (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 354 (6th Cir. 1993)). Tal has not and cannot point to any evidence of fraudulent conduct that was directed at the “judicial machinery” or consisted of any intentionally false statements that actually deceived the Court, let alone of any such conduct associated with the Challenged Orders.

As noted, the Court has already rejected a substantial portion of the “evidentiary submissions” on which Tal purports to rely for its allegations of “fraud upon the court.” In an effort to circumvent the Court’s prior ruling, it argues that it should be allowed to re-litigate those allegations based on “entirely new evidence” that purportedly shows the existence of a scheme initiated six months before the commencement of these proceedings to conceal customer payments and, in Tal’s words, “put Level Propane into involuntary bankruptcy in order to seize control of it as [a] going concern.” (Motion at 4.) This “evidence” consists of what purport to be copies of electronic messages between John Verbos (“Verbos”) and a “Dick,” virtually all of which show dates prior to the filing of the involuntary petitions commencing these cases, in which Verbos and his supposed “co-conspirator” discuss carrying out a plan to divert customer checks and oust Maloof from control of Level Propane.

The “new evidence” cited by Tal, even if it were authenticated and found admissible,<sup>3</sup> does not even come close to suggesting the existence of a “fraud upon the court.” The purported

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<sup>3</sup> Contrary to Tal’s assertions, the authenticity and admissibility of the documents on which it apparently relies are in substantial doubt and would be vigorously contested if the Court were to conduct the evidentiary hearing requested by Tal. As the Court is aware, Verbos has

messages themselves do not refer to or in any way evidence that any intentionally false statements were made to the Court by one of its officers. No link is shown between Verbos's alleged prepetition scheme and the representations made to the Court by any of the parties with respect to the Challenged Orders. Despite Maloof's attempts to suggest otherwise in his prior submissions, nothing in the "new evidence" relied upon by Tal even hints that Verbos knew or communicated with any representative of the Bank Group or the Equipment Financiers prior to the commencement of these proceedings, let alone that any such representative was ever aware of the check "concealment" scheme Verbos had purportedly instituted.

Indeed, there is nothing in the record before the Court verifying that Verbos's alleged scheme was actually carried out. Tal fails to cite any testimony or documents corroborating that a single customer check was diverted or concealed prepetition by Verbos or anyone else. No facts are proffered to support the assertion that Level Propane suddenly experienced diminished cash flow in, as Maloof has alleged, the "tens of millions of dollars" in the months leading up to the filing of the involuntary petition or that it had an unanticipated and corresponding increase in revenues in July and August of 2002 when Verbos somehow supposedly interjected those funds

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denied under oath ever sending or receiving the purported messages. (See Dkt. No. 3365, Objection to Motion to Dissolve Protective Order.) Tal's assertion that Verbos's "co-conspirator" was Richard Anter is entirely conjectural; nothing in the purported messages identifies who "Dick" is or even why that person would have an interest in Level Propane. Finally, due to Maloof's failure to comply with this Court's order directing him to turn over the electronic media on which these messages supposedly reside, the Debtors have had no means to determine through forensic examination where the messages are authentic; indeed, Maloof's refusal to comply with the turnover order and his continued resistance to an appropriate investigation into their legitimacy serve only to lend credibility to the suspicion that the documents he has proffered to the Court are, in fact, fabricated.

back into the company. There is absolutely no proof that such alleged scheme resulted in Level Propane's insolvency or the filing of the involuntary petitions commencing these proceedings.<sup>4</sup>

In short, the Court need not conduct an evidentiary inquiry into Tal's allegations because, even if they were true, they would not provide a cognizable basis for relief from the Challenged Orders under Fed.R.Civ.P. 60(b)(6). Tal's "new evidence" in support of its allegation of "fraud upon the court" is no more sufficient to establish the elements of such claim than was Maloof's "old evidence." Even if the Court were to give credence to the notion that Verbos somehow caused the downfall of Level Propane - despite the absence of evidence supporting that allegation - Tal has failed to show why this implausible theory gives rise to a right to relief from the Challenged Orders under Fed.R.Civ.P. 60(b)(6). The Motion is plainly without merit and should be denied.

**B. As a matter of both rule and equity, Tal's Motion is time-barred.**

In its February 28 Order, the Court ruled that Maloof's Third Amended Motion to Vacate the Conversion Order and the Sales Order was time-barred by the doctrine of laches. (February 28 Order at 7-10.) Tal contends that this ruling is inapplicable to its Motion because it "had no prior notice of the fraud upon the Court that is the basis for this motion" and because it is predicated on "entirely new evidence establishing entirely new facts." These assertions reflect a profound misunderstanding of both the time limits imposed on motions under Fed.R.Civ.P. 60(b) and the law of laches. Under either the limitations imposed by rule or equity, the Motion is plainly time-barred.

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<sup>4</sup> As the Court has observed, Maloof has long contended that Level Propane was solvent at the time of the filing of the involuntary petitions commencing these cases and had predicated his prior attempts to reopen the Examiner's investigation and to vacate the Agreed Order on that allegation. (See February 28 Order at 4-5.)

Even if the Motion is understood as being brought pursuant to subsection (6) of Rule 60(b),<sup>5</sup> Tal was still required to have filed the Motion within “a reasonable time” from the entry of the Challenged Orders. “Whether a Rule 60 motion is filed ‘within a reasonable time’ is dependent upon the facts in a case, including length and circumstances of delay in filing, prejudice to opposing party by reason of the delay, and circumstances warranting equitable relief.” *Ruehle v. Educ. Credit Mgmt. Corp. (In re Ruehle)*, 307 B.R. 28, 33 (B.A.P. 6th Cir. 2004), *aff’d*, 412 F.3d 679 (6th Cir. 2005); *Eglinton v. Loyer (In re G.A.D., Inc.)*, 340 F.3d 331, 335 (6th Cir. 2003) (same; citing *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Applying these considerations, Tal’s attempt to overturn orders that were entered five and even six years ago cannot be deemed to have been brought within a reasonable time.

Tal has undoubtedly been aware of these proceedings since they commenced. It was the first creditor to file a proof of claim in these cases and was an active participant in these proceedings at the very time the Challenged Orders were being entered. (See, e.g., Dkt. No. 448, Objection to Cure Amount, and No. 1706, Stipulated Order.) Tal was certainly aware of Maloof’s repeated efforts, detailed in the February 28 Order, to undermine and vacate the Court’s prior orders in these proceedings since at least June 2006, when Maloof first moved the Court to vacate the Agreed Order based on the allegation that the order was a fraud upon the court. (See February 28 Order at 3-6.) Indeed, Maloof’s attorney, David Eisler, even filed a notice of appearance on Tal’s behalf for the “limited purpose” of joining Maloof’s Renewed and Restated Motion to Reopen Examiner’s Report and for Appointment of a Substitute Examiner.

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<sup>5</sup> Despite its assertion that the Motion is predicated on “new evidence” of Verbos’ alleged fraudulent scheme, Tal obviously cannot argue that it is entitled to relief from the Challenged Motions under either subdivision (2) (“newly discovered evidence”) or (3) (“fraud, misrepresentation or misconduct of an adverse party”) since a motion under either provision may not be made more than one year after the challenged order was entered. Fed.R.Civ.P. 60(b).

(See Dkt. No. 3000, Notice, filed August 7, 2006.) Despite this knowledge, Tal sat on its hands, waiting more than two years before joining in Maloof's discredited effort to vacate the Court's prior orders - an effort that, as the Court has ruled, was in itself untimely and prejudicial to the Debtors and other parties in interest.

It is, in fact, apparent that Tal made a conscious decision not to pursue the relief it now requests until after Maloof had exhausted his attempts to vacate the Agreed Order and the Sale Order. Only then did it decide to become Maloof's proxy in his campaign to overturn these proceedings. Under these circumstances, Tal's delay in filing the Motion until more than five years after the last of the Challenged Orders was entered cannot be deemed reasonable. The resulting prejudice to the Debtors and other constituencies in these proceedings is more than evident; indeed, it is not even clear how the Court could unwind the sale of Level Propane's assets, as Tal apparently desires, five years after the fact, when they have been owned by a subsequent purchaser since October 2003. (See February 28 Order at 3, noting sale of assets by Horizon Propane, LLC to AmeriGas Propane L.P.) Plainly, the filing of the Motion was not "within a reasonable time" after entry of the Challenged Orders.

Contrary to Tal's arguments, the same considerations act as a bar to the Motion under the equitable doctrine of laches. Predicated on the maxim that "[e]quity aids the vigilant and diligent, not those who sleep on their rights[,]" *In re Cmehil*, 43 B.R. 404, 408 (Bankr. N.D. Ohio 1984), laches is applicable where (1) there has been a lack of diligence by the party against whom the defense is asserted and (2) prejudice resulting to the party asserting it. *Itman Miller Inc. v. Palazetti Imports and Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001) (citing *Induct-O-Matic Corp. v. Inductotitm Corp.*, 747 F.2d 358, 367 (6th Cir. 1984)). The question under the first of these elements is not, as Tal asserts, when it learned of the "new evidence" on which the

Motion is supposedly predicated but whether it exercised diligence in bringing the Motion based on the facts known by it and those with which it is chargeable as a matter of inquiry. *See McDonald v. Robertson*, 104 F.2d 945, 948 (6th Cir. 1939) (“Knowledge of facts putting a person of ordinary prudence on inquiry is the equivalent of actual knowledge and if one has sufficient information to lead him to a fact, he is deemed to be conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice.”). Tal was put on notice of Maloof’s allegations of “fraud upon the court” no later than June of 2006. Its all but acknowledged failure to exercise any diligence in investigating those allegations during the intervening two years and seeking relief from the Challenged Orders requires that the Motion be deemed barred as a matter of equity.

### III. Conclusion

For the foregoing reasons and the authorities cited, as well as those reasons and authorities as may be presented at hearing, the Debtors respectfully request that both the Motion and the Hearing Request be denied and that the Debtors be granted such other and further relief as the court finds to be just and equitable.

Dated: Cleveland, Ohio  
October 2, 2008

Respectfully submitted,

/s/ Mark A. Phillips

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 2, 2008, a copy of the foregoing Objection was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

*/s/Mark A. Phillips* \_\_\_\_\_

Mark A. Phillips

One of the Attorneys for the Debtors