

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

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

REPLY BRIEF IN SUPPORT OF MOTION OF TAL FINANCIAL CORPORATION TO VACATE AGREEDCONVERSION ORDER, DOCKET NO. 5, ORDER APPROVING EAGLEROCK MANAGEMENT AGREEMENT, DOCKET NO. 676, ORDER APPROVING POST-PETITION FINANCING AGREEMENT, DOCKET NO. 679, ORDER APPROVING GLOBAL SETTLEMENT, DOCKET NO. 1667 AND ORDER APPROVING SALE OF THE GOING CONCERN ASSETS OF LEVEL PROPANE, DOCKET NO. 1721, PURSUANT TO BANKRUPTCY RULE 9024

Now comes Tal Financial Corporation, a creditor in the above-captioned Chapter 11 Case, by and through counsel undersigned, and submits for its Reply Brief in support of its Motion to Vacate the Agreed Conversion **Order**, Docket Item No. 5, the Order approving the Management Agreement between Eaglerock Propane and purported Debtors, Docket No. 676, the Order Approving Post-Petition Financing Agreement, Docket No. 679, the Order Approving the Global Settlement between the purported Debtors and the lead secured creditors, Docket Item No. 1667 and the Order Approving Sale of the Going Concern Assets Of Level Propane, Docket No. 1721, pursuant to Bankruptcy Rule 9024, incorporating R. 60(b)(6), F.R.C.P.,by reference, the following:

INTRODUCTORY STATEMENT

The Debtors make two arguments in opposition to the Motion to Vacate: first, that the Verbois emails of 2002 do not establish a basis for relief from the challenged orders and second, the Motion to Vacate is time-barred. The answer to both of these arguments is found in the law of this case, the conclusions of Judge Aldrich in *Maloof v. Level Propane Gase, Inc.*, 07-0153 (U.S.D.C., N.D. O.), in which she observed:

“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.

In this Motion, fraud on the court can be proved, and it is therefore in the interest of justice to upset these final judgments that have offended justice.

The Debtors sharply attack the Verbos email exchanges of 2001 and 2002, in which he conspired with "DA," (believed is Richard Anter, later the President of Level Propane after it came under the management of Eaglerock Propane during these proceedings) to conceal customer payment checks in order to misrepresent the cash-flow of the going concern. The misrepresented cash-flow was to lend a pretext of insolvency in order to facilitate the Bank Group's involuntary bankruptcy filing in June, 2002. This customer check concealment continued during the bankruptcy proceedings, and served not only to misrepresent the going concern's cash-flow, but further to misrepresent the number of customers the going concern had. This misrepresentation of the customer count served to direct the going-concern assets to Horizon Propane, Eaglerock Propane's nominee, and the straw-man for Amerigas. That Horizon Propane was the straw-man for Amerigas is born out by the fact that Amerigas, purchased the assets from Horizon on October 1, 2003, which had been purchased from the Debtors on June 27, 2003, hardly more than a matter of weeks.

That both Horizon Propane and Amerigas knew that the customer count was misrepresented at the published number of 35,000, see LPGas News Article 11/1/03 (Ex. 1) when Amerigas emails disclose that both Horizon and Amerigas knew, as of October 1, 2003, that the customer count was at least 58,372, based even on their artificially restrictive definitions, Amerigas Customer Count Email of October 1, 2003 (Ex. 2). The sudden jump in the customer count between June 27, 2003 and October 1, 2003, *even before thousands of customer checks had passed through the cash room in October, 2003*, can be explained by only one circumstance: that 23,372 customer checks appeared as Horizon Propane receipts after June 27, 2003, so that those customers who had been delivered gas paid for it, thereby qualifying as customers under the Horizon/Amerigas customer definition, see the Statement of Jeff Kessler, incorporated by reference.

The disabling of customer database, see the Statement of Suzanne Arena, which provided the pretext for this improvised customer definition, worked hand-in-glove with the customer check

concealment to suppress the customer count. The customer count was suppressed in order more easily direct the going-concern assets to Horizon Propane as the “only qualifying bidder” in the second auction of May, 2003.

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**As to the Motion’s Grounds for Relief under R.60(b)(6):
The evidence amply demonstrates fraud upon the court.**

The burden of a party seeking to vacate a judgment premised on fraud upon the Court is set out in *Demjanjuk v. Petrovsky* 10 F.3d 338, 354 (6th Cir., 1993.) The five elements of that fraud are, in summary, that the fraud be on the part of an officer of the court, that the fraud be directed to the judicial machinery itself, that the conduct consist of intentionally false statements or concealments, that these false statements or concealments occur when there is a duty to disclose them, and that the false statements or concealments actually deceive the court. Here, the deliberate scheme to misrepresent the cash-flow, customer check receipts and customer count all served to direct the going-concern assets to Horizon Propane in June, 2003. The Verbos email exchanges of 2002 continued even after the involuntary petition was filed in June, 2002, ending only on August 15, 2002. Verbos at the time these emails were exchanged was an officer of the Debtors, and, as such, an officer of the Court, see *In Re: Intermagnetics* 926 F.2d 912 (9th Cir., 1991).

The check concealment scheme was part of a broader effort to create a pretext to maintain the Debtors falsely under the jurisdiction of this Court so that their assets could be directed to their intended recipient. Thus, the first element of *Demjanjuk, supra*, is shown.

The conduct was directed at the judicial machinery itself when it falsely invoked the jurisdiction of this Court, and maintained that jurisdiction for a malicious purpose, the direction of the going concern to Horizon Propane and out of the control of the Debtor, rather than either the reorganization of the Debtors or the liquidation of their debts, see *In Re: Landmark Distributors, Inc.* 189 B.R. 290 (D.N.J., 1995.) Thus, the second element of *Demjanjuk, supra*, is satisfied.

The conduct, customer check concealment, customer concealment, misstatements of the cash-flow while the going concern was under the claimed jurisdiction of this Court, were all intentionally false statements or concealments. Thus, the third element of *Demjanjuk, supra*, is shown.

That there was a duty to disclose the receipt of customer payment checks, disclose the true number of customers and accurately report the cash-flow of the going concern, is manifest. Were there no such duty, there would be no need for any monthly Operating Reports. Thus, the fourth element of *Demjanjuk, supra*, is shown.

That these proceedings have advanced and that this Court has continued to engage in the process initiated and maintained by fraud demonstrates that the Court has actually been deceived, thereby satisfying the fifth element of *Demjanjuk, supra*.

This Movant does not seek to circumvent the prior rulings of the Court, rather, it asks the Court to reject orders that have been shown to be both result and in furtherance of a fraud upon the Court. The Verbos emails demonstrate that the involuntary bankruptcy was initiated for an impermissible purpose, the placement of what were Level Propane's going concern assets beyond the reach of its shareholder and the placement of those assets in the hands of third parties. This Court has been shown by means of the evidence that it has been made into an instrument of the petitioning creditors. No Court can tolerate such conduct.

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As to the Timeliness of the Motion: No Time Bar Applies to Fraud Upon the Court.

This Movant was certainly aware of existing allegations of fraud: but fraud alleged is by no means fraud proven. As Judge Aldrich said: "where fraud can be proved, even a final judgment may be upset in the interests of justice." The judgments here challenged have worked an injustice upon every creditor that would have done business with the concerns thrown into bankruptcy by the Bank Group, who have lost millions of dollars as a result. Among those creditors that have lost money is the Movant. The Movant exercised its independent judgment in filing this Motion, and the reasonable time in which it was filed is subject to the facts of each case. The test for relief under R. 60(b)(6) is whether the

circumstance is “*exceptional or extraordinary*,” *Olle v. Henry & Wright Corporation* 910 F.2d 357, 365 (6th Cir., 1990), not, as asserted by the Debtors, that the motion had to be filed within a reasonable time. The circumstances here are of an exceptional and extraordinary nature: as outrageous as that described in *Landmark Distributors, Inc., supra*, and on a far greater scale.

This fraud demands a remedy, regardless of the passage of time, as there is no time bar as to fraud upon a Court, see e.g., *Demjanjuk, supra*, in which the judgment was vacated more than fifteen (15) years after the denaturalization order, when there had been allegations of fraud pending for nine (9) years before the decision. A reasonable time is determined by the availability of clear and convincing evidence. Clear and convincing evidence of this outrage, beyond the single fact, as noted by Judge Aldrich, that the going concern assets had been sold, became first available in March, 2007, with the discovery of Jeff Kessler, and a fuller account of the scheme finally became available in May, 2008, with the discovery of the Verbos emails. The test, as articulated by Judge Aldrich is “where fraud on court can be proved,” not when there is reason to suspect. The Movant has no duty to act under R. 60(b)(6) until it has satisfied itself that all the facts that can be gathered are in hand to present to the Court, because the right to discovery is discretionary with the court::

“A Rule 60(b) motion is addressed to the sound discretion of the Court. *Jacobs v. DeShetler*, 465 F.2d 840, 843 (6th Cir. 1972). Likewise, *the scope of discovery is within the discretion of the trial judge. Chemical & Indus. Corp. v. Druffel*, 301 F.2d 126, 129 (6th Cir. 1962).” *H.K. Porter Company v. Goodyear Tire & Rubber, Inc.* 563 F. 2d 1115, 1119 (6th Cir., 1976), emphasis supplied.

Thus, the Movant had not only a right but an obligation to satisfy itself that the facts are in hand before it asks the Court vacate a proceeding of such scale.

The Debtors further assert that the laches applies to the present Motion remedy, citing *Induct-o-Matic v. Inductotherm* 747 F.2d 358 (6th Cir., 1984). What the Debtors failed to observe was that the case set out in its requirements for laches that the party asserting it must do so with clean hands:

“This court noted in *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir.1979), *cert. denied* 447 U.S. 905, 100 S.Ct. 2987, 64 L.Ed.2d 854 (1980)

(quoting *Costello v. United States*, 365 U.S. 265, 282, 81 S.Ct. 534, 543, 5 L.Ed.2d 551 (1961)):

‘Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.’ . . . [L]aches is an equitable defense and ... *it can certainly be raised only by one who comes into equity with clean hands . . .*’” at 367, emphasis supplied.

Here, the Debtors, the creatures and instrumentalities of the petitioning creditors, cannot in good faith claim that they come into equity with clean hands. The evidence of record makes it clear that the hands of those driving this proceeding are anything but clean.

Conclusion

In conclusion, for the further reasons set forth above, the Movant prays that its Motion be granted and for such further relief as is just in the premises.

Respectfully submitted,

TAL FINANCIAL CORPORATION
By its Attorney

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Service

I hereby certify that on this 31st day of October, 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/ Evans J. Carter

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