

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO**

In re:)	Chapter 11
)	
LEVEL PROPANE GASES, INC., <i>et al.</i>)	Case No. 02-16172
)	Jointly Administered
Debtors.)	
)	Randolph Baxter
)	
_____)	Adversary Proceeding No. 09-01116
)	
BILL WILHELM)	
)	
Plaintiff,)	
)	
v.)	
)	
MARK UHRICH, PLAN)	
ADMINSTRATOR)	
)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO
DISMISS COMPLAINT OF PLAINTIFF BILL WILHELM**

I. INTRODUCTION

Plaintiff Bill Wilhelm (“Plaintiff”) filed his Complaint to Revoke Confirmation of Plan of Liquidation of Level Propane Gases, Inc., et al. and for Other Relief (the “Complaint”) with this Court on March 30, 2009. Plaintiff requests that the Court (a) revoke confirmation of the joint liquidating plan of Level Propane Gases, Inc., and its affiliated debtors and former debtors in possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases and (b) enjoin enforcement of orders of the Court entered prior to confirmation of the Plan. As demonstrated below, the Complaint fails to state a claim upon which relief may be granted and defendant Mark

Uhrich, the Plan Administrator of the Consolidated Estate of the Debtors (the “Plan Administrator”), therefore respectfully requests that the Court dismiss the Complaint.

II. THE PROCEDURAL HISTORY OF THE DEBTORS’ CASES

A. THE INITIATION OF BANKRUPTCY PROCEEDINGS, THE APPOINTMENT OF THE EXAMINER, AND THE SALE OF DEBTORS’ BUSINESS.

The procedural history of the bankruptcy cases of the Debtors is largely undisputed. Various creditors of the Debtors commenced an involuntary bankruptcy proceeding under chapter 7 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Northern District of Ohio (the “Court”) on June 6, 2002. (B.R. 1: Involuntary Petition).¹ Pursuant to the agreement and stipulation of the relevant parties, the case was subsequently converted to one under chapter 11 and the cases were thereafter jointly administered under Case No. 02-1672. (B.R. 5: Agreed Final Order); (B.R. 17: Order Converting Cases).

On or about April 14, 2003, the Court, on the motion of the United States Trustee (B.R. 1107: Motion to Appoint Examiner), ordered the appointment of an examiner in the Debtors’ chapter 11 cases to address allegations that Debtors’ counsel had misled the court and had failed to provide objective advice to the Debtors. (B.R. 1281: Order). Thereafter, G. Ray Warner was appointed to serve as examiner (the “Examiner”) (B.R. 1312: Order Approving Selection of Examiner). On June 6, 2003, the Examiner - after reviewing thousands of pages of documents and conducting 22 sworn and unsworn witness interviews - filed his report and related exhibits, deposition transcripts, and supporting documentation with the Court. (B.R. 1616-18, 1620-26,

¹ The abbreviation “B.R.” refers to the Bankruptcy Court’s docket entry numbers.

1628-30, & 1632-34: Examiner's Report and Exhibits thereto). The Examiner concluded, *inter alia*, that the evidence failed to support the allegations that had prompted his appointment.

The Examiner investigated allegations that [BFC&A] was taking direction from the [Bank Group] and/or their counsel. . . . Based upon the documents reviewed and the witness interviews, the Examiner found no evidence that [BFC&A] was controlled by the [Bank Group] and/or their counsel. Indeed, in most respects, it is the Examiner's conclusion that [BFC&A] competently represented the interests of the Debtors in these cases. . . . The Examiner found no evidence that [BFC&A] engaged in improper communications with the [Bank Group] or their counsel prior to the filing of the involuntary chapter 7 cases or that [BFC&A] had an arrangement, an advance understanding, or a unilateral design to advance the interests of the [Bank Group] at the expense of their then clients, the petition Debtors.

(*Id.*, Examiner's Report at 3-4). *See also William Maloof v. Level Propane Gases, Inc.*, No. 1:07cv0153, slip op. at 3, 8 (N.D. Ohio Aug. 16, 2007) (“[T]he Examiner filed a report finding that there was no evidence that [Debtors' counsel] had committed any wrongdoing. * * * The Examiner found that [Debtors' counsel] had acted in good faith, competently, and honestly.”).

On June 27, 2003, following a court-approved marketing and sales procedure, the Court entered an order on the Debtors' motion approving the sale of the Debtors' propane distribution business as a “going concern.” (B.R. 1721: Order Approving Sale (the “Level Sale Order”)). Eaglerock Propane LLP (“Eaglerock”) purchased these assets. The Court found that the consideration to be paid by Eaglerock was “fair and reasonable”, that the asset purchase agreement had been negotiated “at arm's length, without collusion and in good faith”, and that the Debtors and Eaglerock were “entitled to the protections of section 363(m) of the Bankruptcy Code.” (*Id.* at ¶¶ Q-R). On January 21, 2004, the Debtors' parking lot business was also sold as a going concern following the Court's approval. Both this sale order and the Level Sale Order were appealed by Maloof to the United States District Court for the Northern District of Ohio (the “District Court”), which affirmed the orders and dismissed the appeals. *William Maloof v.*

Level Propane Gases, Inc., Nos. 1:03CV2038, 2044, 2106 & 1:04CV0092 & 0307, slip op. (N.D. Ohio March 24, 2006).

B. THE MALOOF MOTIONS.

Unable to stop the sale of the Debtors' business assets, Maloof embarked on a campaign to undermine and frustrate the Debtors' bankruptcy proceedings, filing a series of motions for the re-opening of the Examiner's investigation and to vacate the Agreed Final Order and the Level Sales Order based on what the Court has described as "vague conspiracy allegations." These motions dominated and were the focus of the Debtors' bankruptcy proceedings for nearly two and half years.

On January 31, 2006 - two and a half years after the filing of the Examiner's Report - Maloof filed his Motion to Reopen the Examiner's Investigation and for Substitute Examiner (the "First Motion to Reopen"). (B.R. 2887: First Motion to Reopen). On June 27, 2006, following an evidentiary hearing, the Court issued an order denying the First Motion to Reopen. (B.R. 2974: Memorandum of Opinion and Order). After a detailed review and analysis of Maloof's evidentiary submissions, the Court found that Maloof had failed to present "credible evidence (a) of a systematic campaign of document destruction or (b) that the Debtors' financial balance sheet or customer records were compromised" and denied the motion. (Id. at 12, 14-15). Maloof neither appealed nor sought reconsideration of the Court's order.

On June 6, 2006, Maloof filed his Motion 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 Bankruptcy Petition Filed June 6, 2002 (the "First Motion to Vacate"), seeking relief under Fed.R.Civ.P. 60(b)(6) and Fed.R.Bankr.P. 9024 and asserting that the Agreed Final Order was procured by fraud. (B.R. 2969: First Motion to

Vacate). For factual support, the First Motion to Vacate largely relied upon and incorporated by reference the Examiner's Report and the exhibits thereto. (Id.). On November 28, 2006, the Court denied the First Motion to Vacate finding, *inter alia*, that relief was not warranted under Fed.R.Civ.P. 60(b). (B.R. 3039: Memorandum of Opinion and Order at 5-6). The Court's decision was thereafter affirmed by the District Court on appeal. *William Maloof v. Level Propane Gases, Inc.*, No. 1:07cv0153, slip op. (N.D. Ohio Aug. 16, 2007).

On July 12, 2006, Maloof also filed his "Renewed and Restated Motion to Reopen Examiner's Investigation and for Substitute Examiner" with the Court. (B.R. 2981: Motion to Reopen Examiner's Report and for Appointment of Examiner, Renewed and Restated) ("Second Motion to Reopen"). In the Second Motion to Reopen, Maloof again demanded that a new examiner be appointed, asserting that "new evidence" had just recently become available that "demonstrates conclusively a campaign of deliberate, criminal, document destruction and concealment of material facts with damning conduct that is specific as to the date, time, place and parties." (B.R. 2981: Second Motion to Reopen at 1, ¶ 2). On November 28, 2006, the Court issued its Memorandum of Opinion and Order denying Maloof's Second Motion to Reopen. (B.R. 3037: Memorandum of Opinion and Order). The District Court subsequently affirmed the Court's decision. *William Maloof v. Level Propane Gases, Inc.*, No. 1:07cv0103, slip op. at 5-6 (N.D. Ohio Aug. 16, 2007).

On September 5, 2007, just three weeks after the District Court had issued its decisions affirming the denial of the First Motion to Vacate and the Second Motion to Reopen, Maloof filed a Motion to Vacate Conversion Order of June 11, 2002 and Sale Order of Level Propane Going-Concern Assets of June 27, 2003 (the "Second Motion to Vacate"). (B.R. 3140: Second Motion to Vacate). As described by the Court in its February 28, 2008 Memorandum of Opinion

and Order denying the Second Motion to Vacate, Maloof had “latche[d] on to piecemeal statements” in the District Court’s opinion affirming the denial of the First Motion to Vacate “as an invitation to further conduct a fishing expedition and continue his attempt to vacate orders that this Court approved in 2002 and 2003 and that have already been re-examined by this Court as a result of Maloof’s filings.” (B.R. 3253: Memorandum of Opinion and Order at 7). Concluding that the Second Motion to Vacate was barred under the doctrines of finality and laches, the Court observed that:

Although not clear in his Motion, Maloof clarifies in his response to the Debtors’ objection that he is alleging four courses of fraudulent conduct: 1) the pre-petition seizure of control of the companies by the Bank Group; 2) document concealment, disposal and destruction to leave no means of testing the accuracy of the customer database; 3) manipulation of the tank count and the customer count in order to misrepresent the customer base level; and 4) waylaying of customer payment checks before assets were sold. Maloof further alleges that these four courses of fraudulent conduct, and evidence attached to support the courses of conduct, are proof that there existed a conspiracy to conceal and destroy the going concern value of Level Propane. Despite Maloof’s assertions to the contrary, this is simply a recasting of the arguments he has repeatedly and unsuccessfully made before this Court and on appeal.

(Id. at 8-9). Further, having examined and considered each of the more than 20 exhibits attached to the Second Motion to Vacate, the Court found that they “offer no support for [Maloof’s] vague conspiracy allegations”, do “not lead to a conclusion that the Debtors’ going concern value was purposely deflated”, and “fail to demonstrate fraud upon this Court.” (Id. at 10, 11). The Court therefore denied the Second Motion to Vacate and entered judgment accordingly. (B.R. 3254: Judgment). Maloof appealed that judgment to the District Court (B.R. 3255: Notice of Appeal), where that appeal remains pending. *See William Maloof v. Level Propane Gases, Inc.*, No. 1:08cv679 (N.D. Ohio).

Notwithstanding his appeal of the Court’s denial of the Second Motion to Vacate, Maloof filed his 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 (the “Third Motion to Vacate”), on June 18, 2008. (B.R. 3348: Motion to Vacate Pursuant to R. 60(b)(2)). In that motion, Maloof asked the Court to vacate and reconsider its decision denying the Second Motion to Vacate and to vacate the Agreed Final Order and the Sale Order based on a set of purported electronic messages he claimed to have just discovered. Virtually all of these alleged messages were dated prior to the filing of the Involuntary Petition six years earlier and purported to evidence a “check concealment scheme” undertaken by a Level employee, John Verbos (“Verbos”).

The Court conducted a hearing on Maloof’s request for an evidentiary hearing in connection with the Third Motion to Vacate and the Debtors’ motion for expedited discovery on July 8, 2008. At that hearing, it issued a bench ruling denying Maloof’s request for lack of jurisdiction with respect to the underlying motion. It further found that, in the absence of jurisdiction with respect to Third Motion to Vacate, the Debtors’ request for expedited discovery was moot but that the electronic files in Maloof’s possession were property of Debtors’ estate pursuant to 11 U.S.C. § 541(a) and thus subject to turnover under 11 U.S.C. § 542(e). Accordingly, it entered an order on July 18, 2008, directing Maloof to turnover the electronic records within five days. (B.R. 3376: Order Directing Turnover of Debtors’ Records). It then issued a Memorandum of Opinion and Order on July 28, 2008, reflecting its bench ruling on Maloof’s request for an evidentiary hearing and denying the Third Motion to Vacate on jurisdictional grounds. (B.R. 3388: Memorandum of Opinion and Order). Maloof did not seek appellate review of the denial of the Third Motion to Vacate but did appeal to the District Court from the Order Directing Turnover. *See William Maloof v. Level Propane Gases, Inc.*, No. 08cv2097 (N.D. Ohio) (appeal pending).

C. CONFIRMATION OF THE DEBTORS' PLAN.

On March 21, 2008, the Debtors filed their Motion for Order (i) Pursuant to Bankruptcy Code Section 1125 Approving Disclosure Statement; (ii) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, and (iii) Establishing Voting Record Date, seeking, *inter alia*, the Court's approval of a disclosure statement in connection with a joint liquidating plan proposed by the Debtors and the Official Committee of Unsecured Creditors of Level Propane Gases, Inc. (the "Committee" and, collectively with the Debtors, the "Plan Proponents"). (B.R. 3290: Disclosure Statement Motion). On April 5, 2008, Maloof filed an objection to this motion, in which he attacked the proposed Disclosure Statement for its "failure" to parrot the allegations he had been making for the prior two years:

The proposed Disclosure Statement . . . fails to provide adequate information for the reason that it has not addressed the issues of fraud upon the court, which includes the document despoliation, the compromises of the customer database and the customer tank, and the waylaying of millions of dollars in customer payments made to Level Propane prior to the sale of its going concern assets in 2003, see the Motion to Vacate (Docket Item No. 3140, as amended). . . . Without a full iteration of the frauds committed, it is sufficient to say that courses pursued by the lead creditor in these proceedings, generally referred to as the Bank Group . . . had as their achieved object the seizure of the going concern of the Debtors, particularly Level Propane Gases, Inc., in order to deliver the going concern to Amerigas, L.P. As set out by the [Second] Motion to Vacate, these parties choked off every other avenue of relief for the businesses, so that the only buyer left was Horizon Propane, Amerigas, L.P.'s straw man.

(B.R. 3306: Objection at ¶¶ 2-3).

At a hearing on May 27, 2008, the Court denied Maloof's objection to the extent it was predicated on the "failure" to disclose these allegations, but sustained it in part based on various concerns expressed by the Court regarding the financial disclosures made in the proposed Statement. The Plan Proponents thereafter twice amended the proposed Disclosure Statement to meet these concerns. (See B.R. 3341 and 3374). On July 7, 2008, Maloof filed yet another

objection to the proposed Disclosure Statement, this time predicated on the allegations contained in the Third Motion to Vacate.

In light of the [sic] his recently filed R. 60(b)(2) Motion to Vacate, Docket Item No. 3348, shareholder, incorporating its arguments, hereby objects to the Disclosure Statement as proposed, because it fails to disclose the substantial dispute concerning the fraud upon this Court by which these bankruptcy proceedings initiated and have been advanced and depended upon to this date.

(B.R. 3370: Objection at ¶ 1). Following a hearing, the Court entered an order approving the Disclosure Statement, as amended, on July 18, 2008, overruling Maloof's objection in its entirety. (B.R. 3377: Order Approving Amended Disclosure Statement (the "Disclosure Statement Order")). No appeal was filed from that order.

Pursuant to the Disclosure Statement Order, the Debtors solicited acceptances or rejections of the proposed joint liquidating plan (the "Plan") from holders of allowed claims in the designated voting class of creditors. Creditors eligible to vote on the Plan had until September 22, 2008, to return their ballots to the Ballot Agent. Further, parties in interest had until September 29, 2008, to file and serve written objections to confirmation of the Plan. Maloof was the only party who filed an objection to the Plan,² arguing that the Plan should not be confirmed based on the matters he had raised in his motions to vacate.

The proposed Liquidation Plan is yet another occasion by which those who control the purported Debtors in the proceedings [sic] to ratify the fraud on the court by which these proceedings were initiated and advanced through this Court;

Incorporating by reference the Shareholder's Motion to Vacate, Docket Item No. 3140, as amended [the Second Motion to Vacate], and incorporating further by

² However, two other purported creditors of the Debtors, Ohio Truck & Trailer, Inc. and TAL Financial Services, Inc., filed virtually identical motions to vacate on September 9, 2008, and September 23, 2008, respectively, asking the Court to vacate various orders entered in 2002 and 2003, including the Agreed Final Order and the Level Sale Order. (See B.R. 3432 and 3449). These motions were explicitly based upon and incorporated by reference the Second and Third Motions to Vacate. The Court denied those motions on November 7 and 14, 2008. (See B.R. 3496 and 3504).

reference the Shareholder's arguments set out in his Brief in *Maloof v. Level Propane Gases, Inc.*, Case No. 08-0670 (U.S.D.C, N.D.O.), now pending before the District Court, the objecting shareholder says that these proceedings are a vehicle by which the Bank Group seized control of the going concern of Level Propane with the singular purpose of excluding altogether the Shareholder from the propane marketing industry. That this was the purpose of the Bank Group is born out by the concerted efforts taken, as set out in the Shareholder's Motion to Vacate, seize the going-concern assets so that they could be folded into the assets of Amerigas in October, 2003.

(B.R. 3455: Objection to Proposed Chapter 11 Liquidation Plan at ¶¶ 1 and 2).

The Court conducted a hearing on the Plan Proponents request for confirmation of the Plan on October 7, 2008. Upon hearing the arguments of counsel for Maloof and the Debtors at the hearing, the Court found that Maloof's objection to the Plan was not timely filed, despite adequate notice of the objection deadline, and on October 9, 2008, entered its order confirming the Plan. (B.R. 3471: Order Confirming Joint Plan of Liquidation (the "Confirmation Order")). Maloof sought reconsideration of his objection to the Plan, restating verbatim the text of his original objection. (B.R. 3478: Motion for Reconsideration). That motion was denied by the Court in an order entered November 20, 2008. (B.R. 3510: Order Denying Motion for Reconsideration). Neither Maloof nor any other party in interest appealed from the Confirmation Order.

Under the Plan as confirmed by the Court (the "Confirmed Plan"), Mark Uhrich was appointed to serve as plan administrator of the consolidated estate of the Debtors as of the Confirmed Plan's effective date. On October 23, 2008 (the "Effective Date"), the Plan Administrator took possession of the consolidated estate's assets and commenced his appointment. Notice of the Effective Date was filed and served on all entitled parties. (B.R. 3487). Further, and in accordance with the Confirmation Order, all injunctions and releases

contained in the Confirmed Plan and the Confirmation Order went into effect on the Effective Date. (See, e.g., Confirmation Order at ¶ J).

D. THE COMPLAINT.

Plaintiff filed his Complaint in this adversary proceeding on March 30, 2009, asking that the Court revoke the Confirmation Order pursuant to section 1144 of the Bankruptcy Code, 11 U.S.C. § 1144, and “enjoin enforcement” of the Agreed Final Order, the Level Sales Order, and the order approving the compromise between Plaintiff and the Debtors with respect to his claims in the bankruptcy proceedings. Plaintiff devotes most of his Complaint to recounting the allegations of conspiracy and fraudulent schemes Maloof had repeatedly raised in his various motions and objections during the more than two and a half years prior to the entry of the Confirmation Order. Specifically, Plaintiff alleges: (1) an improper seizure of control of the Debtors by the Debtors’ lenders (Complaint at ¶¶ 9, 12-16, and 18-23); (2) the concealment and destruction of documents regarding Debtors’ customer base (Id. at ¶¶ 26-28); (3) the manipulation of tank counts and customer counts (Id. at ¶¶ 26-28); and (4) the concealment of customer payment checks. (Id. at ¶¶ 11, 17, and 26-28). With minor variations in phrasing, these allegations are indistinguishable from the allegations made by Maloof in the Second and Third Motions to Vacate and “incorporated by reference” into his objections to the proposed Disclosure Statement and confirmation of the Plan.

Following this recitation of Maloof’s conspiratorial musings, Plaintiff then baldly alleges that the Plan Proponents “knew of the schemes to fraudulently seize and maintain control of Level Propane and Park Place, and further knew of the steps taken to conceal the fraudulent schemes by which control was seized and maintained both pre-Petition and post-Petition.” (Complaint at ¶ 31). He further alleges that the Plan Proponents knew of but “failed to disclose

the merits” of Maloof’s appeal from this Court’s order approving the settlement agreement the Debtors had reached with Walter Himmelman and National Union Fire Insurance Company (the “D&O Compromise”). (Id. at ¶ 32). Finally, he alleges that the Plan Proponents “knew that there was scant evidentiary support” for the claims being asserted in certain state court litigation against the law firm of Squire, Sanders & Dempsey, *Level Propane Gases, Inc. v. Squire, Sanders & Dempsey*, Cuyahoga County Court of Common Pleas Case No. 02-CV-469882 (the “SS&D Litigation”), “knew that the suit would almost certainly fail as a source of funding” and that the defendants “would successfully defend the suit”, yet “induced the Court to rely on the claim as a source of . . . funding” for the Plan. (Id. at ¶ 33). These three allegations appear to constitute the entire basis for the relief sought in the Complaint.

III. LAW AND ARGUMENT

A. THE STANDARD UNDER FED.R.CIV.P. 12(b)(6).

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) tests the sufficiency of the complaint. The Court views the complaint in a light most favorable to the plaintiff, *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir.1998), assumes the plaintiff’s factual allegations are true, *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 996 (6th Cir.1994), and determines whether the plaintiff has pleaded “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).

This standard, however, “requires more than the bare assertion of legal conclusions.” *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir.1997) (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir.1995), *cert. denied*, 516 U.S. 1158, 116 S.Ct. 1041, 134 L.Ed.2d 189 (1996)). *See also Twombly*, 127 S.Ct. at 1964-65 (“more than labels and conclusions” are required and “a formulaic recitation of the elements of a cause of action will not

do”). Only well-pleaded facts must be taken as true.” *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998). The complaint must contain direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *Twombly*, 127 S.Ct. at 1969; *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir.1993). Accordingly, “[a] motion to dismiss under Rule 12(b)(6) will be granted if the complaint is without merit due to an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or where the face of the complaint reveals that there is an insurmountable bar to relief.” *Davis v. DCB Financial Corp.*, 259 F.Supp.2d 664, 669 (S.D. Ohio 2003) (citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978)).

It is also well-settled that the Court may consider matters of which it can take judicial notice under Fed.R.Evid. 201, including public court records, in determining a motion to dismiss made pursuant to Fed.R.Civ.P. 12(b)(6) without converting the motion to one for summary judgment. *See, e.g., Winget v. JP Morgan Chase Bank, N.A.* 537 F.3d 565, 576 (6th Cir. 2008) (the district court could examine objections previously ruled on by the bankruptcy court to determine whether the movant’s current objection was based largely on the same claims); *Paley v. U.S.*, 349 F.3d 418, 425 n. 5 (7th Cir. 2003) (court is entitled to take judicial notice of matters in public record in resolving motion to dismiss); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 16-17 (1st Cir. 2003) (court should consider not only complaint but also matters of public record susceptible to judicial notice in dismissing action). Such consideration is particularly warranted here, where the Complaint references significant portions of the history of these bankruptcy cases and orders entered by this Court. Thus, this Court may consider the history of the Debtors’ cases and this Court’s orders in the Debtors’ cases in dismissing the Complaint without converting this Motion into a motion for summary judgment.

Finally, under Fed.R.Civ.P. 9(b), in order to state a claim for fraud, “a party must state with particularity the circumstances constituting fraud[.]” Fed.R.Civ.P. 9(b). Specifically, the party must “allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the [other party]; and the injury resulting from the fraud.” *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. 2005) (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)).

B. THE COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF UNDER SECTION 1144 OF THE BANKRUPTCY CODE.

Section 1144 of the Bankruptcy Code, in relevant part, provides:

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.

11 U.S.C. § 1144 (emphasis supplied). Because the order must have been “procured by fraud,” only fraud directed at the bankruptcy court “will provide the foundation for vacating an order of confirmation.” *First Union Nat’l Bank of Florida v. Perdido Motel Group, Inc.*, 142 B.R. 460, 464 (N.D.Ala. 1992). Accordingly, in order to obtain revocation of a confirmation order under this statute, the plaintiff must plead and prove: (1) that a plan proponent made a representation regarding compliance with section 1129 of the Bankruptcy Code that was materially false; (2) that the plan proponent knew the representation was false, believed it to be false, or made the representation with reckless disregard for the truth; (3) that the representation was made with the intent to induce the court to rely upon it; (4) that the representation was in fact relied upon by the court; and (5) that as a result of the reliance, the confirmation order was entered. *Tenn-Fla Partners v. First Union National Bank of Florida (In re Tenn-Fla Partners)*, 226 F.3d 746, 750 (6th Cir. 2000). The non-disclosure of facts to the bankruptcy court can satisfy these elements only where there has been: (1) an intentional omission; (2) by a party with a duty to disclose; (3)

of facts that would be material to finding the party complied with section 1129; (4) that were withheld so that the court would find the party complied with section 1129; and (5) that as a consequence of such non-disclosure, the court entered the confirmation order. *Tenn-Fla Partners v. First Union National Bank of Florida (In re Tenn-Fla Partners)* 228 B.R. 720, 731 (W.D. Tenn 1999), *aff'd*, 226 F.3d 746 (6th Cir. 2000).

Plaintiff asserts that the Confirmation Order should be revoked because the Plan Proponents “made specific misrepresentations to this Court and fraudulently concealed the wrongdoing, outlined above.” (Complaint at ¶ 34). At no point, however, does Plaintiff identify a single, specific affirmative misrepresentation by the Plan Proponents in connection with the proceedings leading to the Confirmation Order. The closest Plaintiff comes in this regard is his allegation that the Plan Proponents “continued to represent the [SS&D Litigation] as a source of funding for the Plan, and induced the Court to rely on the claim as a source of such funding.” (Id. at ¶ 33). Plaintiff never alleges where, when or how this supposed “representation” was made to the Court.

In fact, no such representation was ever made by the Plan Proponents. To the contrary, the Amended Disclosure Statement approved by the Court on July 17, 2008, specifically states that “[t]he net recovery in the SS&D Litigation, if any, will be distributed to holders of certain Allowed Claims pursuant to the terms of the Litigation Proceeds Sharing Agreement, as incorporated in the Plan.” (B.R. 3374: Amended Disclosure Statement at 22, ¶ U, emphasis supplied). Consistent with this statement, the distribution analysis for the Plan showed how the Consolidated Estate’s assets would be distributed if zero proceeds were recovered as a result of the SS&D Litigation. (Id. at Ex. 2, Schedule 2). The Plan Proponents simply never made any representation to the Court regarding the merits of or likely proceeds from the SS&D Litigation.

Plaintiff also alleges that the Plan Proponents “failed to disclose the merits” of Maloof’s appeal from the Court’s order approving the D&O Compromise. (See B.R. 3266: Order Granting Motion to Compromise, entered March 4, 2008). According to Plaintiff, the Plan Proponents somehow “dismissed” those merits “by assuring this Court that the settlement would be affirmed on appeal.” (Complaint at ¶ 32). Here again, Plaintiff fails to allege any specifics as to when such “assurance” was provided to the Court. Nor does he ever allege what “merits” the Plan Proponents were supposed to disclose about Maloof’s appeal. Absent such allegations, it is impossible to conclude that the Plan Proponents in anyway misled the Court into believing that receipt of the proceeds from the D&O Compromise was a certainty. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) (feasibility standard of section 1129(a)(11) is whether plan offers reasonable assurance, not guarantee, of success); *In re Ridgewood Apartments*, 183 B.R. 784, 789 (Bankr. S.D.Ohio 1995) (satisfaction of feasibility requirement does not require that meeting economic projections is certainty).

Nor does Plaintiff’s assertion that the Plan Proponents “concealed” from the Court the allegations of supposed “wrongdoing” that take up the bulk of the Complaint state a claim for revocation of the Confirmation Order. As an initial matter, Plaintiff makes no factual averments that, if true, would show the materiality of those allegations to the confirmation proceedings. A material fact in the context of a claim under section 1144 is “information that is necessary for a court to decide whether the elements prescribed for confirmation have been satisfied.” *Tenn-Fla Partners*, 228 B.R. at 735. Nowhere in the Complaint does Plaintiff even attempt to allege how the supposed non-disclosure of any of the allegations set out at paragraphs 9 through 30 have any bearing on or relevance to the elements of section 1129(a) of the Bankruptcy Code. 11 U.S.C. § 1129(a). Instead, Plaintiff offers nothing more than the bald legal conclusion that “the

unlawfulness of these proceedings make any approval of a Liquidation Plan . . . impossible as a matter of law.” (Complaint at ¶ 34). Even if this assertion had anything to do with the “feasibility” requirement of section 1129(a), it is neither alleged or possible to understand how the Plaintiff’s allegations of “wrongdoing” rendered the Debtors’ chapter 11 proceedings “unlawful” or otherwise prevented the Court from confirming the Plan.

No less dispositive is the absence of any allegations in the Complaint giving rise to the inference that the Plan Proponents had a “duty to disclose” the allegations of wrongdoing. For more than two years prior to the entry of the Confirmation Order, virtually all that the Debtors and the Court had been doing in the underlying proceedings was addressing those very allegations. As a consequence, the Court was well aware of those allegations at the time it entered the Confirmation Order. Indeed, no duty on the part of the Plan Proponents to “disclose” those allegations can be found in light of the Court’s denial of Maloof’s objections to the proposed Disclosure Statement asserting that the Statement was deficient precisely because it did not disclose the “schemes” he alleged. (See B.R. 3306 and 3370). As a matter of law, the Plan Proponents cannot be found to have “fraudulently concealed” matters from the Court when the Court specifically found that no duty to disclose such matters existed when it overruled Maloof’s objections.

It is for this same reason that Plaintiff not only does not, but cannot, allege that the Court relied upon the “non-disclosure” of purported wrongdoing in entering the Confirmation Order. It can only be assumed that Plaintiff fails to allege this essential element of a section 1144 claim because the Court plainly knew of the supposed “scheme” to “seize” the going concern assets of Level at the time it confirmed the Plan; those allegations had been repeated *ad nauseum* by Maloof in virtually every pleading, motion and objection he had filed with the Court since the

entry of the Level Sale Order. The Court had repeatedly rejected those allegations and the materials Maloof had proffered in attempt to substantiate his charges, finding that they “offer[ed] no support for [Maloof’s] vague conspiracy allegations”, did “not lead to a conclusion that the Debtors’ going concern value was purposely deflated”, and “fail[ed] to demonstrate fraud upon this Court.” (B.R. 3253: Memorandum of Opinion and Order at 10, 11). Simply put, in light of the record in the underlying proceedings, there could never be a finding that the Plan Proponents “concealed” the allegations of wrongdoing from the Court or that, as a consequence of such “non-disclosure,” the Court entered the Confirmation Order.

In sum, the Complaint fails to state a claim for relief under section 1144 of the Bankruptcy Code, failing to allege the essential elements of such a claim. Moreover, it is apparent based on the record in the underlying chapter 11 proceedings, that Plaintiff cannot ever state such claim consistent with the obligations of Fed.R.Civ.P. 11. Accordingly, not only should Plaintiff’s claim for revocation of the Confirmation Order be dismissed, but such dismissal should be without leave to replead. *See Hoover v. Langston Equipment Associates, Inc.*, 958 F.2d 742, 745-46 (6th Cir. 1992).

D. THE COMPLAINT FAILS TO STATE ANY “COLLATERAL” CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The Complaint also contains three “collateral” claims for injunctive relief in which the Plaintiff asks the Court to “enjoin enforcement” of the Agreed Final Order, the Level Sale Order and the order approving the compromise Debtors’ controversies with Plaintiff (collectively, the “Collateral Claims for Relief”). (Complaint at ¶¶ 35-39). However, Plaintiff does not set forth any allegations that, if true, would establish an entitlement to the requested injunction. A plaintiff seeking a permanent injunction must plead and prove four factors:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

Ebay Inc. v. Mercexchange, L.L.C., 547 U.S. 388, 126 S.Ct. 1837, 1839 (2006). Not only does the Complaint fail to contain any allegations pertaining to these four factors, it fails to identify any provision or rule under the Bankruptcy Code providing for such relief. Indeed, it is impossible to understand the request for an injunction against “enforcement” of the orders at issue, since they ask the Court to revisit matters decided at the dawning of these cases and undo sales and compromises long since consummated. There is nothing in those orders requiring “enforcement” of any sort. For these reasons alone, the Collateral Claims for Relief should be dismissed.

Moreover, it is obvious that these claims are nothing more than a recast version of the Motions to Vacate filed by Maloof pre-confirmation and rejected by the Court. The terms of the Plan as confirmed by the Court and the terms of the Confirmation Order specifically preclude the Collateral Claims for Relief. See Plan at § 12.10.2 (permanently enjoining prosecution of “causes of action” or other actions “inconsistent” with the provisions of the Plan); Confirmation Order ¶ J (enjoining actions that arose prior to the Effective Date). Even if they did state a cognizable claim, the Collateral Claims for Relief are themselves barred and enjoined.

Additionally, the Confirmation Order “constitutes a final judgment in [the] bankruptcy proceeding” that, pursuant to 11 U.S.C. § 1141(a), is binding on all creditors and equity security holders. *Sanders Confectionary Prods., Inc. v. Heller Financial Inc.*, 973 F.2d 474, 480 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993). “Confirmation of a plan of reorganization by the bankruptcy court has the effect of a judgment by the district court and res judicata principles bar

relitigation of any issues raised or that could have been raised in the confirmation proceeding.” *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 463 (6th Cir. 1991). *See also Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002) (quoting *Sanders Confectionary* and *Chattanooga Wholesale*). These principles prevent Plaintiff from attempting to litigate his allegation that the orders that are the subject of the Collateral Claims for Relief should be declared “null and void” as products of fraud on the court. Accordingly, the Collateral Claims for Relief should be dismissed, with prejudice, as a matter of law.

IV. CONCLUSION.

For the foregoing reasons and authorities cited, the Plan Administrator respectfully requests that the Court grant its motion by entering an order dismissing the Complaint and grant the Plan Administrator such other and further relief as the Court finds to be just and equitable.

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Respectfully submitted,

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