

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

In re)	Case No. 07-CV-0103
)	
LEVEL PROPANE GASES, INC., et al.,)	
)	Bankruptcy Case No. 02-16172
Debtors.)	
_____)	
)	
WILLIAM H. MALOOF,)	Judge: ANN ALDRICH
)	
Appellant,)	Magistrate Judge: PERELMAN
)	
-vs.)	
LEVEL PROPANE GASES, INC., et al.,)	
)	
Appellees.)	

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

APPELLEE'S BRIEF

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I. INTRODUCTION

The specific issue before this Court is whether the Bankruptcy Court below erred in denying the Renewed and Restated Motion to Reopen Examiner's Investigation and for the Appointment of a New Examiner (the "Renewed Motion") of William H. Maloof ("Malooof" or "Appellant"). Level Propane Gases, Inc. ("Level") and its affiliated debtors and debtors in possession (collectively, the "Debtors" or "Appellees"), in those certain cases under chapter 11 of Title 11 of the United States Code pending in the United States Bankruptcy Court for the Northern District of Ohio and being jointly administered under Case No. 02-1672, maintain that this Court should affirm the decision of the Bankruptcy Court appealed herein. In short, the Court should find that the Bankruptcy Court did not abuse its discretion in determining that the relief requested in the Renewed Motion was barred by the law of the case doctrine where, as here, the Bankruptcy Court determined, after a hearing and a review of the record, that Appellant had failed to provide meaningful new evidence to support his allegations.

II. STATEMENT OF ISSUES

1. Whether the Bankruptcy Court correctly applied the law of the case doctrine in denying the Renewed Motion and did not abuse its discretion in refusing to reconsider its prior determination that Appellant had failed to establish cause for the reopening of the Examiner's investigation or for the appointment of a new examiner?

2. Whether the Bankruptcy Court erred in determining that Appellant had failed to present "any meaningful new evidence" in support of the allegations made in the Renewed Motion?

III. STATEMENT OF THE CASE AND FACTS

The basic history of the Debtors' chapter 11 cases is undisputed. The Debtors' bankruptcy cases were commenced on June 6, 2002 (the "Petition Date") when Deutsche Bank Trust Company Americas, LaSalle Bank National Association and the Provident Bank (collectively the "Petitioning Creditors") filed involuntary petitions for relief (the "Involuntary Petitions") under chapter 7 of the Bankruptcy Code (the "Chapter 7 Cases") against each of Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level, Level Energy Group, Inc. and WHM Emprises, Inc. (collectively, the "Original Debtors"). Subsequent thereto, the Petitioning Creditors, the Original Debtors and Mr. Maloof entered into negotiations regarding the Involuntary Petitions.

On June 11, 2002, this Court entered an *Agreed Final Order and Stipulation: (a) Acknowledging the Authority of Charles Sweet as Sole Director of All Debtors; (b) Converting Cases to Voluntary Cases Under Chapter 11; (c) Granting Order for Relief Under Chapter 11; (d) Ordering Joint Administration of All Cases; and (e) Granting Other Relief* (the "Agreed Order"). The Agreed Order was supplemented on June 13, 2002 to clarify that orders for relief granted pursuant to the Agreed Order were to become effective as of June 17, 2002. On June 17, 2002, this Court entered its *Order Converting Cases to Cases Under Chapter 11 of the Bankruptcy Code*, pursuant to which the Chapter 7 Cases of the Original Debtors were converted to cases under chapter 11 of the Bankruptcy Code.

On or about April 30, 2003, almost a year after the Petition Date, the Bankruptcy Court, on motion of the United States Trustee (the "UST"), ordered the appointment of an examiner in these cases. Appellant had also filed a motion seeking the appointment of an

examiner, which motion was mooted by the Bankruptcy Court's granting of the UST's Motion. Thereafter, G. Ray Warner was appointed to serve as examiner (the "Examiner") by the United States Trustee. On June 6, 2003, the Examiner filed his report with the Court.

On January 31, 2006, two and a half years after the filing of the Examiner's Report, Appellant filed a Motion to reopen the Examiner's investigation (the "Original Motion"). Subsequently, the Bankruptcy Court entered a scheduling order setting April 3, 2006 as the deadline by which Mr. Maloof had to submit his affidavits and exhibits relative thereto. (B.R. 2974 – Memorandum of Opinion and Order, p. 4, n.2).

On June 27, 2006, following a duly noticed evidentiary hearing, the Bankruptcy Court's order denying the Original Motion was entered on the docket maintained by the Clerk of Courts in these jointly administered cases, which order determined that the evidence submitted by Mr. Maloof failed to demonstrate sufficient cause for granting the relief requested. (B.R. 2974 – Memorandum of Opinion and Order – p. 15). No timely appeal of this order was filed. Neither was a timely motion for reconsideration thereof interposed. (B.R. 3006 – Hearing Transcript – p. 20, lines 7 -18).

On July 11, 2006, Mr. Maloof, by and through his counsel, filed the *Renewed and Restated Motion of William H. Maloof to Reopen Examiner's Investigation and for Substitute Examiner*. (B.R. 2981 – Renewed Motion). The Renewed Motion called "for any Examiner appointed to investigate and address the Bank Group's ruthless domination of the Debtors affairs with the singular purpose of destroying the Debtor as a going concern. (B.R. 2981- Renewed Motion – p.1). The Renewed Motion also asserted that it was premised on "[n]ew evidence, which has recently become available to your Movant,

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 – Renewed Motion – p. 1.)

The Renewed Motion incorporated by reference:

the Exhibits in Volume A and the Transcripts in Volume B that constitute the evidence appended to the Examiner’s report of June 6, 2003, Docket No. 1616. Further, your Movant incorporates by reference the Evidentiary Submissions filed in support of his Motion to Reopen Examiner’s Report, filed January 31, 2006. Docket No. 2889, being Docket Nos. 2914, 2926, 2951 and 2952. Further, your Movant incorporates by reference the facts set forth in his recently filed Motion to Vacate and the Affidavit of Timothy Conklin and your Movant’s statement under penalty of perjury offered in support thereof. Further, your Movant incorporates by reference the Court’s decision of June 27, 2006.

(B.R. 2981 – Renewed Motion – p. 2). Additionally, attached to the Renewed Motion as alleged “new evidence” were (a) certain unauthenticated, internal Level emails – (i) an email exchange between Steven Sues, the Debtors’ postpetition chief executive officer, and Jeff Marwil, counsel to the Debtors’ senior secured lender, (ii) an email exchange between Natasha Brandt and Richard Anter regarding the disposition of envelopes contained in a hard copy account reconciliation library, (b) a deposition of Paul Dolansky regarding such envelopes and (c) a blank State of Ohio personal property tax form for Tax Year 2002. (B.R. 2981 – Renewed Motion – Exhibits).

There subsequently followed an orchestrated campaign of supplemental evidentiary submissions – eight in all¹ – each containing discrete pieces of purportedly

¹ Although Appellant filed eight supplemental evidentiary submissions, Appellant only designated seven of them for inclusion in the record on appeal.

new evidence, each provocatively titled, and each containing a detailed exegesis setting forth Appellants' interpretation of such evidence:

Supplemental Submission Number	Date Filed	Alleged New Evidence/
1 (B.R. 2985)	7/17/06	Affidavit of William Maloof re: alleged events that occurred during his interview by the Examiner on May 19, 2003.
2. (B.R. 2986).	7/24/06	<p>Maloo Motion to Compel relative to purported prepetition tape recordings of Debtor's officers - filed on July 29, 2003.</p> <p>Incomplete copy of Examiner's First Request for Production of Documents</p> <p>Bankruptcy Court Order denying Motion to Compel entered on September 5, 2003</p> <p>Affidavit of Jonathan Caldwell dated April 12, 2006</p> <p>Internal Level email exchange between David Jesse, counsel to the Debtors, and Steve Sues, Debtor's postpetition CEO – dated 11/12/03.</p>
3 (B.R. 2987)	7/26/06	<p>Incomplete copy of Examiner's First Request for Production of Documents – Allegedly served on April 21, 2003.</p> <p>Internal Level emails regarding issues with database function re retrieval of customer account data for period prior to March 2002 – dated April 21-22, 2003</p> <p>Internal Level e-mail exchange regarding same customer data issue – dated April 21, 2003.</p> <p>News story regarding AmeriGas acquisition of Debtors' propane distribution business – dated November 1, 2003.</p>
4 (B.R. 2988)	7/31/06	Internal level email exchange forwarding copy of "customer count as a function of past due age analysis." – dated April 26, 2003
5 (B.R. 2989)	8/01/06	<p>Email exchange between Phil Caliesen, counsel for Eaglerock Propane, and Steve Sues, Debtor's CEO, regarding US Trustee response to Debtor's motion to keep customer list under seal</p> <p>Affidavit of William Maloof regarding "mutual caress of victory" between Andrew Vara of the US Trustee's office and Glenn Pollack of Candlewood Partners allegedly witnessed by</p>

		on October 15, 2006.
6 (B.R. 2995)	8/03/06	Affidavit of Suzanne Arena regarding ability to access alleged missing customer data subsequent to April 21, 2003 and the closing and reopening of the hard copy customer account archive. – Dated 7/30/06
7 (B.R. 2997)	8/04/06	Affidavit of Suzanne Arena regarding her role in Debtors efforts to contact holders of customer accounts predating April 2002 and inviting them to return as Level Customers – Dated 8/01/06

In their Objection to the Renewed Motion and Response to the Supplemental Evidentiary Submissions, the Debtors argued that the Renewed Motion was either a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure or a motion for relief from judgment under Civil Rule 60(B)(2). With respect to Civil Rule 59(e), Debtors argued that such a motion was untimely and that Appellant had failed to present newly discovered evidence not available at the time of the hearing or evidence demonstrating a manifest error of law or fact. With respect to Civil Rule 60(B)(2), the Debtors argued that Appellant had failed to present the Court with newly discovered evidence that could not, by due diligence, have been discovered in time to move for a new trial under Civil Rule 59(b).

The Debtor's Objection then proceeded to dissect each of the first five supplemental evidentiary submissions filed by Appellant, noting that that:

- a. The First Supplemental Submission did not constitute new evidence as a similar affidavit setting forth the same claims had been filed with the Court by Appellant on April 13, 2004. (B.R. 2993 - Debtor's Objection – p. 9);
- b. The Second Supplemental Submission – consisting of (a) documents that were or related to pleadings filed with the Court in 2003 or (b) Paul Dolansky's Affidavit dated April 12, 2006 – was not new evidence, but was instead nothing more than an unwarranted attempt to suggest that the Bankruptcy Court had engaged in conduct in this matter which resulted in an "unfair judicial proceeding." (B.R. 2993 – Debtor's Objection – p. 10-11).

- c. The Third Supplemental Submission, consisting primarily of old evidence – the incomplete copy of the Examiner’s document production request to the Debtors, had previously been filed with the Court by Appellant in July 2003, a news story dating from November 2003 – was nothing more than another attempt by Appellant to manipulate facts and create apparent, but unsubstantiated, connections for purposes of making unfounded allegations of wrongdoing by Debtors’ postpetition management in an “orgy of destruction” resulting from “the passion for control already exhibited by the banks.” Specifically, in this instance, implying a connection between the Examiner’s discovery request on Debtors – purportedly served on the Debtors on April 21, 2003, the date on which the Examiner was appointed, and the apparent loss of certain customer data related to transactions predating March 2002, which loss was reflected in unauthenticated internal Level Propane emails also dated on or about April 21, 2003. (B.R. 2993 – Debtor’s Objection – p. 11-12).
- d. The Fourth Supplemental Submission – consisting of nothing more than a single, unauthenticated, internal Level Propane email from April 2003 forwarding a “customer count as a function of past due age analysis.” (B.R. 2993 – Debtor’s Objection – p. 12).
- e. The Fifth Supplemental Submission – consisting of Appellant’s own affidavit with respect to events allegedly witnessed on October 15, 2002 and an unauthenticated email exchange relating to the United States Trustee’s position with respect to a contested matter pending in the Bankruptcy Court in August 2003 – was not new evidence. and ignored the Bankruptcy Court order subsequently entered by the Court and directing that the subject customer records “are to remain under seal to the close or dismissal of the Debtors’ chapter 11 cases. (B.R. 2993 – Debtor’s Objection – p. 13).

At the hearing on the Renewed Motion held on August 8, 2008, the Debtor continued its discussion of the alleged additional “new evidence” submitted by Appellant in support of the Renewed Motion. The Debtor challenged the authenticity of the alleged internal emails Appellant had produced:

But what I would like to focus the Court on is the so called documentary evidence put forth in support of the motion to this Court. The e-mails that we were just referencing, if the Court will take a look at them, they are from an unknown source at the top. There is no authenticity and we can’t verify that there’s been no alteration. So contrary to the filing today by Mr. Maloof’s counsel that these – the authenticity and the veracity of these e-mails are not in question, they are.

(B.R. 3006 – Hearing Transcript – p. 11, lines 14 – 23). The Debtor also challenged Appellant’s characterization of the discovery of the alleged obliteration of the hard copy customer account reconciliation library as “new” evidence:

You notice that counsel in none of his briefing or here today attempts to explain when it is the new evidence was purportedly discovered. However, the last time that I had the opportunity to appear before this Court and the very day of the ruling by – on this motion, counsel for Mr. Maloof referenced e-mails and he referenced issues relating to the destruction of the envelopes that we hear about. That was on the day that the motion was denied.”

(B.R. 3006 – Hearing Transcript – p. 10, lines 6 -15).

The Debtor then turned to Appellant’s Sixth and Seventh Supplemental Evidentiary Submissions – consisting of two separate Affidavits of Suzanne Arena, a former employee of Level Propane Gases, Inc., relating to (i) the alleged destruction of the hard copy customer account reconciliation library and (ii) the alleged disabling of the customer database resulting in an alleged loss of customer data – filed by Appellant in the days immediately preceding the hearing. The Debtors noted that Ms. Arena was the only individual that Appellant had claimed that he didn’t have access to prior to the filing of the Renewed Motion, thus her testimony was the only “new” evidence presented to the Court. (B.R. 3006 – Hearing Transcript – p. 14, lines 18 – 25). Debtors further noted that nothing in this “new” evidence supported the allegations of Bank Group misconduct that was the predicate for Appellants’ renewed and restated request for the appointment of a second examiner.²

However, but what we on know is that even if you look at the affidavit of Suzanne Arena and the evidence presented therein, it supports the fact that there was not an intentional destruction of evidence by anyone in the bank

² (B.R. 2981 - Renewed Motion – p. 1). (“This Renewed and Restated Motion calls for any Examiner appointed to investigate and address the Bank Group’s ruthless domination of the Debtor’s affairs with the singular purpose of destroying the Debtor as a going concern”).

group because nothing in Suzanne Arena's affidavits indicate that the bank group authorized that action.

(B.R. 3006 – Hearing Transcript – p. 14, line 25 to p. 15, line 6). Further, much of her testimony contradicted the broad assertions of document and or data obliteration made by Appellant in the Renewed Motion:

The way that Mr. Maloof filed the documents in this case, we have a series of submissions. And unfortunately, that series of submission creates confusion because had Mr. Maloof filed this as a complete package, what we would have seen is that allegations made early in the submissions about the library being completely destroyed are not true. What Suzanne says is that the hard copy library was not completely destroyed. That there --- when it was opened back up and given access and when she saw it again, the fact of the matter is, is that it contained the past year's customer's information. In other words it would have contained an entire hearing cycle of current customers, and that's at paragraph 11 of her Affidavit to Supplement 6.

(B.R. 3006 – Hearing Transcript – p. 13, line 15 to p. 14, line 5). Similarly, Ms Arena's affidavit conflicted with Appellant's assertion that customer records predating April 2002 and purportedly retrievable via the MODI functionality had been irretrievably lost as of April 21, 2003: "That, around early June, 2003, he was able to access the customer accounts using the MODI functionality from prior to the calendar year 2002 on a computer in John Verbos's office or at a computer at Mary Shoup-Masaitis's work area."

(B.R. 2995 - Sixth Supplemental Evidentiary Submission – Arena Affidavit - ¶ 8).

Subsequent to the hearing, Appellant filed a post-hearing brief. (B.R. 3003). The Debtors filed a response thereto which, among other things, noted that:

Mr. Maloof and his counsel base their request upon numerous unsupported and malicious assertions that the Bank Group was behind and directed the conduct of Level employees, the Trustee, this Court, the Examiner and the lawyers involved – but fail to identify any conduct by the Bank Group itself that gives rise to the Renewed Motion. None of Mr. Maloof's assertions, even if taken as true, demonstrate a link between the Bank Group's alleged desire to destroy Level and thereby reduce their

recovery from the proceeds of the sale of their collateral and any of the alleged conduct by third parties.

(B.R. – 3004 – Response to Post-Hearing Brief – p. 2).

On November 28, 2006, the Bankruptcy Court entered its Memorandum of Opinion and Order denying the Renewed Motion. (B.R. 3037 – Memorandum of Opinion and Order). The Bankruptcy Court noted that “The dispositive issue is whether Maloof has provided a basis to have the Examiner’s investigation reopened, or to have a substitute examiner appointed. (B.R. 3037 – Memorandum of Opinion and Order – p. 3).

With respect to the Renewed Motion, the Court stated:

Maloof now requests that the Court examine alleged “multiple instances of document disposal and shredding”. He contends that new evidence has surfaced which detail what customer and financial records were destroyed. He argues that that these records would show that the Debtor was solvent at the time of the filing of the petition. He also argues that document destruction went to the very justification for the bankruptcy filing and maintenance of the case. Furthermore, Maloof contends that the Examiner relied on statements by persons involved in an alleged fraud and he acquiesced to them.

(B.R. 3037 – Memorandum of Opinion – p. 3). With respect to these allegations, the Bankruptcy Court found that Appellant had “failed to show sufficient cause to support the allegations made herein.” (B.R. 3037 – Memorandum of Opinion – p. 5). The Court found that the requested relief was barred by the doctrine of finality, noting that Appellant was seeking the same relief he had sought on two prior occasions and no meaningful new evidence to support his claims had been presented to the Court:

A review of the record illustrates that four years have passed since this Court appointed an Examiner to investigate the same issues Maloof alleges in this motion. No appeal was filed to the Examiner’s report. More importantly, Maloof is seeking the same relief he has sought on two prior occasions. Although this motion is styled differently, its relief seeks the same result. As pointed out in the Memorandum of Opinion and Order which denied his previous motion to reopen the examiner’s investigation (which relies on substantially the same evidence), *Maloof provides no*

meaningful new evidence to support his claims here, except for bare allegations that Debtor’s management disposed of or destroyed largely unspecified business and financial records of the Debtors.

(B.R. 3037 – Memorandum of Opinion and Order – p. 6) (emphasis added). . The Bankruptcy Court further denied the Renewed Motion under the law of the case doctrine, finding that it had previously ruled on the issue before it – whether Appellant had demonstrated cause to reopen the Examiner’s investigation and appoint an examiner? – and that Appellant had failed to satisfy any of the exceptions to the law of the case doctrine. (B.R. 3037 – Memorandum of Opinion and Order – p. 7).

IV. STANDARD OF REVIEW

“The court reviews bankruptcy court findings of fact for clear error and conclusions of law *de novo*.”³

A bankruptcy court’s findings of fact are not set aside unless clearly erroneous. However, a “bankruptcy court’s legal conclusions, drawn from the facts so found, are reviewed *de novo*.” Absent either a mistake of law or an abuse of discretion, the bankruptcy court ruling must stand. A bankruptcy court “may abuse its discretion by ignoring a material factor that deserves significant weight, relying on an improper factor, or, even if it [considered] only the proper mix of factors, by making a serious mistake in judgment.”⁴

Where a court is reviewing its own prior decision, application of the law of the case doctrine is discretionary in nature.⁵ A court abuses its discretion when it “relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard.”⁶

³ *Borock v. Mathis (In re Clipper Int’l Corp.)*, 154 F.3d 565, 567 (6th Cir. 1998) (citation omitted).

⁴ *In re Campano*, 293 B.R. 281, 283 (D.N.H. 2003) (citations omitted).

⁵ *Perillo v. Johnson*, 205 F.3d 775, 780-781 (5th Cir. 2000).

⁶ *In re Brown*, 342 F.3d 620, 633 (6th Cir. 2003).

V. ARGUMENT

A. THE BANKRUPTCY COURT CORRECTLY APPLIED THE LAW OF THE CASE DOCTRINE IN DENYING THE RENEWED MOTION AND DID NOT ABUSE ITS DISCRETION IN REFUSING TO RECONSIDER ITS PRIOR DETERMINATION THAT APPELLANT HAD FAILED TO ESTABLISH CAUSE FOR THE REOPENING OF THE EXAMINER'S INVESTIGATION OR FOR THE APPOINTMENT OF A NEW EXAMINER.

The Bankruptcy Court did not violate its discretion when it determined that the Renewed Motion must be denied under the law of the case doctrine as Appellant had failed to demonstrate the existence of extraordinary circumstances justifying reconsideration of the Court's prior determination that Appellant had not demonstrated cause for reopening the examiner's investigation. The United States Supreme Court has defined the law of the case as a doctrine that “ ‘posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.’ This rule of practice promotes the finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues.’”⁷

When the law of the case doctrine is applied by a court to its own prior decisions, the doctrine is properly characterized as discretionary in nature.⁸ In that context, the law of the case doctrine expresses the general rule that courts will not reopen issues that have already been decided. The Supreme Court has held that although a court has the power to revisit its own decisions, “as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was ‘clearly erroneous and

⁷ *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)).

⁸ *U.S. v. Dunbar*, 357 F.3d 582, 592 (6th Cir. 2004) (law of case doctrine rigidly applied to enforce a lower court's obedience to a higher court, more flexibly applied to reconsideration of earlier decisions by the same court); *Perillo v. Johnson*, 205 F.3d 775, 780-81 (5th Cir. 2000) (when court is reviewing its own prior decision, law of the case doctrine is matter of judicial discretion rather than judicial power).

would work a manifest injustice.”⁹ As noted by the leading treatise on Federal Practice, the United States Court of Appeals for the Seventh Circuit has expressed a sensible approach to the discretionary aspect of the doctrine:

No one thinks that if a trial judge overrules an objection to the admission of some piece of evidence, and a moment later the lawyer against whom he ruled asks him to reexamine his ruling, the judge may not do so unless he has ‘clear and convincing reasons.’ No judge is so rigid. Judges are constantly reexamining prior rulings in a case on the basis of new information or argument, or just fresh thoughts, without excogitating a ‘clear and convincing’ reason for their change of heart. On the other hand, once a case has been decided, then, unless the decision was avowedly tentative (for example, a decision granting or denying a preliminary injunction or – our earlier example – a decision by a motions panel), there is a natural and healthy reluctance not to reconsider the decision unless powerful reasons are given for doing so. Otherwise parties would have an incentive constantly to pester judges with requests for reconsideration.¹⁰

Controlling precedent in this Circuit holds that here a court renders a decision in a case following thorough argument, it should not revisit that decision in the absence of extraordinary circumstances:

“ ‘[L]aw of the case’ as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power. Nevertheless, a court’s power to reach a result inconsistent with a prior decision reached in the same case is “to be exercised very sparingly, and only under extraordinary conditions.” To differ, we must find some cogent reason to show that the prior ruling is no longer applicable, such as if our prior opinion was a “clearly erroneous decision which would work a manifest injustice.”¹¹

The Sixth Circuit has articulated three extraordinary conditions that warrant reconsideration of a prior ruling in the same case: (1) the subsequent presentation of

⁹ *Christianson*, 460 U.S. 817 (citing *Arizona v. California*, 460 U.S. at 618, n.3). See also *Carnival Leisure Indus. v. Aubin*, 53 F.3d 716, 718 (5th Cir. 1995) (decision establishes law of the case absent manifest error or intervening change in law).

¹⁰ 18 MOORES FEDERAL PRACTICE, § 134.21[1] (Matthew Bender 3d.ed. 2006) (citing *Johnson v. Burken*, 930 F.2d 1202, 1207 (7th Cir. 1991).

¹¹ *Kenneth Allen Knight Trust v. Schilling (In re Kenneth Allen Knight Trust)*, 303 F.3d 671, 677-78 (6th Cir. 2002) (Citations omitted).

substantially different evidence, (2) a subsequent contrary view of the law is decided by controlling authority, and (3) where a decision is clearly erroneous and would work a manifest injustice.¹²

Appellant argues that the Bankruptcy Court erred in applying the law of the case doctrine in this matter because the Bankruptcy Court failed to identify and articulate the “law” it was applying. Appellant’s mechanistic approach is, however, derived from case law in dealing with the application of the law of the case doctrine in situations where a higher court has made a legal determination, remanded the matter to the trial court, and the trial court’s subsequent determination was also appealed.¹³ Where the law of the case is applied to a court’s own decisions, “the law of the case doctrine expresses the general rule that courts will not reopen issues that have already been decided.”¹⁴ Here, the Bankruptcy Court was merely determining whether any of the alleged “new” evidence presented by Appellant in connection with the Renewed Motion made a review of its prior determination that Mr. Maloof had not presented sufficient evidence to demonstrate cause to reopen the Examiner’s investigation or appoint a new examiner necessary, *i.e.*, whether Appellant had satisfied any of the exceptions to the law of the case doctrine set forth in controlling precedent.

In its Memorandum of Opinion, the Bankruptcy Court noted that the dispositive issue raised by the Renewed Motion “is whether Maloof has provided a basis to have the Examiner’s investigation reopened, or to have a substitute examiner appointed.” (B.R.

¹² *Craft v. United States*, 233 F.3d 358, 364 (6th Cir. 2000).

¹³ *Craft*, 233 F.3d at 363 (“this case is about the extent to which a prior decision of this court binds a subsequent panel when neither the facts, the parties nor the law has changed.”); *Coal Resources, Inc. v. Gulf & Western, Ind.*, 865 F.2d 761, 766, *opinion amended on denial of reh’g*, 877 F.2d 5 (6th Cir. 1989) (same); *Kenneth Allen Knight Trust*, 303 F.3d at 677 (prior holding by appellate panel established law of case that bankruptcy court and district court had to follow on remand); *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (same).

3037 – Memorandum of Opinion and Order – p. 3). The Court had previously considered that precise issue in connection with the Original Motion filed by Appellant on January 31, 2006. (B.R. 2974 – Memorandum of Opinion and Order – p.4) (“The threshold issue before the Court is whether Maloof has shown cause to have the Examiner’s investigation reopened or, in the alternative, to have a second examiner appointed”). With respect to the Original Motion, the Bankruptcy Court had entered a scheduling order setting April 3, 2006 as the deadline by which Maloof must submit his affidavits and exhibits relative thereto. (B.R. 2974 – Memorandum of Opinion and Order, p. 4, n.2). On June 27, following an evidentiary hearing, the Bankruptcy Court entered a Memorandum of Opinion and Order (B.R. 2974) and a separate judgment [B.R. 2975 (in record?)], setting forth a detailed analysis of the various evidentiary submissions submitted by Appellant and determining that:

The Movant has failed to show sufficient cause to support the allegations made herein. Thusly, insufficient cause has been demonstrated to warrant the reopening [of] the Examiner’s investigation and, further Movant has failed to demonstrate sufficient cause for the appointment of a second examiner.”

(B.R. 2974 – Memorandum of Opinion and Order – p. 15).

In rendering its decision on the Renewed Motion, the Bankruptcy Court, after a duly noticed hearing and an examination of the record, found that the evidence submitted did not support the allegations Appellant made in the Renewed Motion. (B.R. 3037 – Memorandum of Opinion and Order – p.5). The Bankruptcy Court further found that Appellant had provided “no meaningful new evidence to support his claims here.” (B.R. 3037 – Memorandum of Opinion and Order – p. 6). In such circumstances, the Bankruptcy Court below correctly concluded that the Renewed Motion and the evidence

¹⁴ 18 MOORES FEDERAL PRACTICE, § 134.21[1].

submitted with respect thereto did not establish the extraordinary circumstances necessary to justify revisiting its prior, unappealed decision that Appellant had failed to establish cause for the reopening of the examiner's investigation or the appointment of a second examiner.

B. THE RECORD BELOW SUPPORTS THE BANKRUPTCY COURT'S DETERMINATION THAT APPELLANT FAILED TO ADDUCE MEANINGFUL NEW EVIDENCE TO SUPPORT HIS CLAIMS THAT CAUSE EXISTED FOR THE REOPENING OF THE EXAMINER'S INVESTIGATION OR FOR THE APPOINTMENT OF A NEW EXAMINER.

Appellant also contends that the Bankruptcy Court failed to consider in any manner whatsoever, the additional evidence presented with the renewed motion. The Bankruptcy Court's Memorandum of Opinion and Order of November 28, 2006 does not, it is true, contain the detailed evidentiary critique that graced the opinion denying the Original Motion. The opinion on the Renewed Motion and the record below, however, clearly reflect that the Court considered the alleged "new evidence" presented by Appellant and contained in the Renewed Motion and the supplemental evidentiary submissions and found them lacking.

The Bankruptcy Court's Memorandum of Opinion and Order denying the Renewed Motion indicates that its ruling followed "a duly noticed hearing and an examination of the record." (B.R. 3037 – Memorandum of Opinion and Order – p.1).

With respect to the Renewed Motion, the Court stated:

Maloof now requests that the Court examine alleged "multiple instances of document disposal and shredding". He contends that new evidence has surfaced which detail what customer and financial records were destroyed. He argues that that these records would show that the Debtor was solvent at the time of the filing of the petition. He also argues that document destruction went to the very justification for the bankruptcy filing and maintenance of the case. Furthermore, Maloof contends that the Examiner

relied on statements by persons involved in an alleged fraud and he acquiesced to them.

(B.R. 3037 – Memorandum of Opinion – p. 3). With respect to these allegations, the Bankruptcy Court found that Appellant had “failed to show sufficient cause to support the allegations made herein.” (B.R. 3037 – Memorandum of Opinion – p. 5). Finally, the Bankruptcy Court stated that:

A review of the record illustrates that four years have passed since this Court appointed an Examiner to investigate the same issues Maloof alleges in this motion. No appeal was filed to the Examiner’s report. More importantly, Maloof is seeking the same relief he has sought on two prior occasions. Although this motion is styled differently, its relief seeks the same result. As pointed out in the Memorandum of Opinion and Order which denied his previous motion to reopen the examiner’s investigation (which relies on substantially the same evidence), ***Maloof provides no meaningful new evidence to support his claims here***, except for bare allegations that Debtor’s management disposed of or destroyed largely unspecified business and financial records of the Debtors.

(B.R. 3037 – Memorandum of Opinion and Order – p. 6) (emphasis added). Clearly, the Bankruptcy Court considered the “new evidence,” adduced by Appellant in connection with the Renewed Motion, it simply concluded that the “new evidence” was either not new or not credible or otherwise inadequate to provide “meaningful” support for the allegations of misconduct alleged in the Renewed Motion,

Additionally, the record of the proceedings in this contested matter indicates that the significance of the “new evidence” was fully explored by Appellant and the Debtors in the various pleadings filed with respect to the Renewed Motion. At the outset, of their Objection to the Renewed Motion, the Debtors pointed out that it:

incorporates by reference, for purposes of economy, the Exhibits in Volume A and the Transcripts in Volume B that constitute the evidence appended to the Examiner’s report of June 6, 2003, Docket No. 1616. Further, your Movant incorporates by reference the Evidentiary Submissions filed in support of his Motion to Reopen Examiner’s Report, filed January 31, 2006. Docket No. 2889, being Docket Nos. 2914, 2926,

2951 and 2952. Further, your Movant incorporates by reference the facts set forth in his recently filed Motion to Vacate and the Affidavit of Timothy Conklin and your Movant's statement under penalty of perjury offered in support thereof. Further, your Movant incorporates by reference the Court's decision of June 27, 2006.

(B.R. 2981 – Renewed Motion – p. 2), and that all of this evidence, being available prior to the June 27, 2006 ruling on the Original Motion, did not constitute new evidence.

(B.R. 2993 – Debtors' Objection – p. 7).

The Debtor's Objection then proceeded to dissect each of the first five supplemental evidentiary submissions filed by Appellant, noting that that:

- a. The First Supplemental Submission did not constitute new evidence as a similar affidavit setting forth the same claims had been filed with the Court by Appellant on April 13, 2004. (B.R. 2993 - Debtor's Objection – p. 9);
- b. The Second Supplemental Submission – consisting of (a) documents that were or related to pleadings filed with the Court in 2003 or (b) Paul Dolansky's Affidavit dated April 12, 2006 – was not new evidence, but was instead nothing more than an unwarranted attempt to suggest that the Bankruptcy Court had engaged in conduct in this matter which resulted in an "unfair judicial proceeding." (B.R. 2993 – Debtor's Objection – p. 10-11).
- c. The Third Supplemental Submission, consisting primarily of old evidence – the incomplete copy of the Examiner's document production request to the Debtors, had previously been filed with the Court by Appellant in July 2003, a news story dating from November 2003 – was nothing more than another attempt by Appellant to manipulate facts and create apparent, but unsubstantiated, connections for purposes of making unfounded allegations of wrongdoing by Debtors' postpetition management in an "orgy of destruction" resulting from "the passion for control already exhibited by the banks." Specifically, in this instance, implying a connection between the Examiner's discovery request on Debtors – purportedly served on the Debtors on April 21, 2003, the date on which the Examiner was appointed, and the apparent loss of certain customer data related to transactions predating March 2002, which loss was reflected in unauthenticated internal Level Propane emails also dated on or about April 21, 2003. (B.R. 2993 – Debtor's Objection – p. 11-12).
- d. The Fourth Supplemental Submission – consisting of nothing more than a single, unauthenticated, internal Level Propane email from April 2003

forwarding a “customer count as a function of past due age analysis.” (B.R. 2993 – Debtor’s Objection – p. 12).

- e. The Fifth Supplemental Submission – consisting of Appellant’s own affidavit with respect to events allegedly witnessed on October 15, 2002 and an unauthenticated email exchange relating to the United States Trustee’s position with respect to a contested matter pending in the Bankruptcy Court in August 2003 – was not new evidence. and ignored the Bankruptcy Court order subsequently entered by the Court and directing that the subject customer records “are to remain under seal to the close or dismissal of the Debtors’ chapter 11 cases. (B.R. 2993 – Debtor’s Objection – p. 13).

Neither was the allegation regarding the alleged obliteration of the hard copy, customer account reconciliation library – as evidenced by the email exchange between Dick Anter and Natasha Brandt and the Affidavit of Paul Dolansky attached to the Renewed Motion – newly discovered evidence.

You notice that counsel in none of his briefing or here today attempts to explain when it is the new evidence was purportedly discovered. However, the last time that I had the opportunity to appear before this Court and the very day of the ruling by – on this motion, counsel for Mr. Maloof referenced e-mails and he referenced issues relating to the destruction of the envelopes that we hear about. That was on the day that the motion was denied.”

(B.R. 3006 – Hearing Transcript – p. 10, lines 6 -15).

The Sixth and Seventh Supplemental Evidentiary submissions – consisting of two separate Affidavits of Suzanne Arena, a former employee of Level Propane Gases, Inc., relating to (i) the alleged destruction of the hard copy customer account reconciliation library and (ii) the alleged disabling of the customer database resulting in an alleged loss of customer data – were filed immediately prior to the hearing on the Renewed Motion, thus their significance was discussed at length at such hearing. As noted by Debtors’ counsel at the hearing, Ms. Arena was the only individual that Appellant has claimed that he didn’t have access to prior to the filing of the Renewed Motion, thus the only “new

evidence” presented to the Court. (B.R. 3006 – Hearing Transcript – p. 14, lines 18 – 25). Moreover, nothing in this “new evidence” supported the allegations of Bank Group misconduct that was the predicate for Appellants’ renewed and restated request for the appointment of a second examiner.¹⁵

However, but what we on know is that even if you look at the affidavit of Suzanne Arena and the evidence presented therein, it supports the fact that there was not an intentional destruction of evidence by anyone in the bank group because nothing in Suzanne Arena’s affidavits indicate that the bank group authorized that action.

(B.R. 3006 – Hearing Transcript – p. 14, line 25 to p. 15, line 6). Further, much of her testimony contradicted the broad assertions of document and or data obliteration made by Appellant in the Renewed Motion:

The way that Mr. Maloof filed the documents in this case, we have a series of submissions. And unfortunately, that series of submission creates confusion because had Mr. Maloof filed this as a complete package, what we would have seen is that allegations made early in the submissions about the library being completely destroyed are not true. What Suzanne says is that the hard copy library was not completely destroyed. That there --- when it was opened back up and given access and when she saw it again, the fact of the matter is, is that it contained the past year’s customer’s information. In other words it would have contained an entire hearing cycle of current customers, and that’s at paragraph 11 of her Affidavit to Supplement 6.

(B.R. 3006 – Hearing Transcript – p. 13, line 15 to p. 14, line 5). Similarly, Ms Arena’s affidavit conflicted with Appellant’s assertion that customer records predating April 2002 and purportedly retrievable via the MODI functionality had been irretrievably lost as of April 21, 2003: “That, around early June, 2003, he was able to access the customer accounts using the MODI functionality from prior to the calendar year 2002 on a

¹⁵ Renewed Motion – p. 1. (“This Renewed and Restated Motion calls for any Examiner appointed to investigate and address the Bank Group’s ruthless domination of the Debtor’s affairs with the singular purpose of destroying the Debtor as a going concern”).

computer in John Verbos's office or at a computer at Mary Shoup-Masaitis's work area." (B.R. 2995 - Sixth Supplemental Evidentiary Submission – Arena Affidavit - ¶ 8).

Thus, contrary to Appellant's assertion, the record in this case reflects that the characterization, significance, and relevance of the "evidence" submitted by Appellant in support of the Renewed Motion was extensively and thoroughly presented to the Bankruptcy Court in the course of its deliberations. The record further reflects that the Appellant resubmitted and incorporated by reference in the Renewed Motion, all of the evidence previously submitted to the Court in its consideration of the Original Motion. Providing, therefore, a basis for the Bankruptcy Court's conclusion that the Original Motion "relied on substantially the same evidence." (B.R. 3037 – Memorandum of Opinion and Order – p. 6). The record further reflects that much of the additional evidence submitted to the Court in connection with the Renewed Motion and the Supplemental Evidentiary Submissions was not "new" evidence at all. The record further reflects that the two affidavits of Suzanne Arena – arguably, the only "new" evidence - did not support Appellant's request for an examiner to "investigate and address the ruthless domination of the Debtor's affairs with the singular purpose of destroying the Debtor as a going concern" or Appellant's allegations regarding an alleged "campaign of deliberate, criminal, document destruction and concealment of material facts." Thus, the record clearly supports the Bankruptcy Court's conclusion that Appellant provided "no meaningful new evidence to support his claims here." (B.R. 3037 – Memorandum of Opinion – p. 6).

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the Bankruptcy Court's Order of November 28, 2006 denying the Renewed Motion.

Dated: Cleveland, Ohio
February 1, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February 2007, the foregoing Appellee's Brief 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 M. Neumann

David M. Neumann, Counsel for Appellees