

**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.	)	
_____	)	
	)	JUDGE ANN ALDRICH
WILLIAM H. MALOOF,	)	
	)	
Appellant,	)	MAGISTRATE JUDGE PERELMAN
	)	
	)	
vs.	)	
	)	
LEVEL PROPANE GASES, et. al.	)	
	)	
Appellees	)	

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

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**APPELLANT'S BRIEF**

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## **STATEMENT OF THE CASE**

This case was instituted in the Bankruptcy Court for the Northern District of Ohio by the filing of an involuntary Chapter 7 creditor petition on June 6, 2002. By Order of the Bankruptcy Court pursuant to agreement the case was converted to a Chapter 11 on June 11, 2002. A management team was installed for the Debtor the first week in July, 2006. On September 23, 2002, an attempt to auction the assets of Level Propane, the largest of the Debtors, failed. Subsequently, Level Propane was placed under the management of Eaglerock Propane by court order of October 17, 2002. Eaglerock took part in the management of the affairs of Level Propane, renamed Horizon Propane through the 2002-2003 heating season. In response to media attention regarding the pre-petition and post-petition management of Level Propane, the United States Trustee moved for the appointment of an Examiner pursuant to 28 U.S.C. Sec. 1104. The Court granted the Motion on April 14, 2003 and appointed the Examiner with instructions by order of April 28, 2003. The Examiner submitted his report, pursuant to Court Order, under seal on June 6, 2003. His report was subsequently unsealed and docketed shortly thereafter. Simultaneously, a global settlement was reached on April 28, 2003 and the assets of Level Propane sold to Horizon Propane on August 1, 2003, the prevailing and only bidder at the second auction of these assets. Horizon then sold these assets to Amerigas, with Court approval, on October 1, 2003.

On January 31, 2006, William Maloof, the sole shareholder of Level Propane, filed a Motion to Reopen the Examiner's Investigation, citing various instances of document shredding by the management of the Debtor, Level Propane. In subsequent filings, he presented additional evidence of further shredding incidents, as statements

under penalty of perjury. By order of June 27, 2006, after hearing on April 12, 2006, the Court denied the motion. On July 12, 2006, Appellant renewed the Motion to Re-open the Examiner's Investigation, this time providing specific email documentation that identified specifically the conduct that merited the reopening of the investigation. Over the weeks that followed, further evidence emerged of the compromise of customer records by the management of Level Propane. This further evidence was presented to Court as it emerged. A hearing was held on August 8, 2006. That evidence, discussed in detail in the Argument below, describes specifically the steps taken to compromise the customer records and conceal the locations of customer tanks. The Renewed Motion was denied by order dated November 28, 2006. This appeal followed by timely notice.

### **STATEMENT OF THE ISSUES**

1.) Whether the Bankruptcy Court erred the application of the law of the case doctrine in this case when it failed to articulate any previous rule stated in the litigation which it applied to the evidence presented in furtherance of the Motion denied by the Order from which this appeal is taken.

2.) Whether the Bankruptcy Court erred when it failed to consider in any manner whatsoever the evidence presented in furtherance of the Renewed Motion.

## LAW AND ARGUMENT

(1)

**THE BANKRUPTCY COURT ERRED IN THE APPLICATION OF THE LAW OF THE CASE DOCTRINE IN THIS CASE WHEN IT FAILED TO ARTICULATE ANY PREVIOUS RULE STATED IN THE LITIGATION WHICH IT APPLIED TO THE EVIDENCE PRESENTED IN FURTHERANCE OF THE MOTION DENIED BY THE ORDER FROM WHICH THE APPEAL IS TAKEN.**

The Opinion from which this appeal is taken attempts to apply the doctrine of law of the case to side-step the evidence put before it by the Renewed Motion that it denied. That the Opinion seeks to side-step the new evidence is clear from a reading of the Opinion and the Order of June 27, 2006 which it claims as the source of the law of the case. In order to assert the doctrine, the cases articulating the doctrine make clear that the existing law must be found somewhere, articulated, and then that law, as found, must be applied to the facts before the court in order ascertain whether the doctrine can be applied to particular facts presented, *Craft v. United States* 233 F3d 358, 363-364 (6<sup>th</sup> Cir, 2000), *In Re Kenneth Allen Knight Trust*, 303 F3d 671, 676-677 (6<sup>th</sup> Cir, 2002).

While the Opinion exquisitely articulates the discretionary basis upon which an examiner is to be appointed and a hornbook capsule of the doctrine of law of the case, it is mute regarding two essential points: first, what, indeed, is the law of this case upon it relies to rebuff the new evidence, and second, any mention of the evidence presented by the Renewed Motion, let alone an assessment of its sufficiency to show cause to reopen the examiner's investigation. The Opinion discloses that it reaches its conclusion as if this evidence, consisting of emails of undisputed authenticity and unchallenged affidavit testimony altogether amounting to 14 separate pieces of evidence, had never been docketed at all.

Appellant turns first to the essential matter of the law of this case. The Opinion appealed from never states the law of the case upon which it relies: it only states that it has rejected a prior motion because:

“alleged spoliation of business records [were] based primarily on a handful of isolated incidents in which former employees of the Debtors purportedly witnessed the destruction of unspecified documents.” Opinion at 6

To search the Opinion of June 27, 2006 for the law of this case, as to this case and this issue that Opinion stated that for an examiner’s investigation to be reopened the moving party must “provide credible evidence (a) of a systematic campaign of document destruction or (b) that the Debtors’ financial balance sheet or customer records were compromised.” at 15. This finding of June 27, 2006, however, was never articulated as the law of the case in this litigation, see by contrast, *Hanover Insurance Co. v. American Engineering Co.* 105 F.3d 306, 312, (6<sup>th</sup> Cir., 1997) citing *Coal Resources, Inc. v. Gulf & Western, Inc.*, 865 F.2d 761, 766-767 (6<sup>th</sup> Cir. 1989).

None of the cases articulating the doctrine of the law of the case contemplate or even countenance that this doctrine would be invoked without an articulation of the law applied to reach a particular result or without making any finding of fact addressing the evidence submitted. For example, in *Coal Resources, supra*, 865 F.2d at 766, the Court specifically articulated the law as set out in its first opinion before it even approached the question of the evidence. Similarly, in *Hanover, supra*, 105 F.3d at 312, the Court cited its exact prior language as an *essential mechanical step* in application of the law of the case. Similarly, the Court that applied the doctrine of law of the case to decide *In re: Kenneth Allen Knight Trust*, 303 F.2d 671 (6<sup>th</sup> Cir., 2002) was careful to state that “We will first examine what we said in Brady [the prior case] and whether those statements

established the law of the case,” 303 F. 2d at 676. Finally, in *Craft, supra*, the Court in applying the doctrine set up the issue before it as: “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.” 233 F.3d at 363, emphasis supplied.

The application of the law of the case doctrine in the Opinion here appealed was a procedural impossibility since the Opinion never articulated the law of the case, which was the first essential mechanical first step of the application of the doctrine. Failure to articulate the law as stated in the prior opinion of June 27, 2006 in the Opinion subject of this appeal made it mechanically impossible to apply the law of the case doctrine to the Renewed Motion.

Consequently, the Opinion must fail for want of the law of the case it purports to apply. In order to invoke the doctrine of law of the case, it must first articulate that which it regards as the law of the case. Having failed to articulate this law, there is simply nothing to apply.

(2)

**THE BANKRUPTCY COURT ERRED WHEN IT FAILED TO CONSIDER IN ANY MANNER WHATSOEVER THE ADDITIONAL EVIDENCE PRESENTED WITH THE RENEWED MOTION.**

The Opinion fails to apply whatever law it may claim to the evidence presented to the Renewed Motion. Without doing so, it is impossible to invoke the doctrine of law of the case to deny the Renewed Motion. In each instance where the doctrine has been applied, the facts were specifically addressed, and where the doctrine applied only after a specific finding was made that no further evidence was submitted. The Opinion’s failure to acknowledge the existence of the new evidence was essential to reach its result: it

expressly states that the Renewed Motion “relied on substantially the same evidence” as the initial motion, *id* at 6. As discussed below, this statement in the Opinion is plainly at odds with the record.

The Opinion, which invokes the doctrine of law of the case despite this new evidence, is thus necessarily fatally flawed, *Craft, supra, Knight Trust, supra*. In both *Craft, supra*, and *Knight Trust, supra*, there was no change in the evidence, while here the Renewed Motion responded to the findings of the June 27, 2006 Opinion with the very sort of evidence that it found wanting in the initial motion. The evidence supporting the Renewed Motion consisted of both contemporaneous written evidence and testamentary evidence that demonstrated who, when, where and precisely what customer records were compromised. The Movant articulated the significance of each piece of evidence and further articulated the purpose of each act of data vandalism. That *this evidence was put on the record as it became available to Movant* is born out by the fact that at first the Movant believed that the customer account reconciliation library had been destroyed (Docket No. 2981), which the Debtor did not dispute (calling the spoliation “an act of charity”), only to discover later, with the statement of Suzanne Arena (Docket No. 2995, Ex. “A”), that it had not been destroyed but moved off-premises in order to conceal its existence.

The evidence disclosed a series of outrages that is an extraordinary step-by-step effort to conceal the locations of customer tanks and customers in order to strip the company of its apparent going-concern value. No opinion can rely on the law of the case doctrine to reach its result and consider the evidence presented, which is precisely why it was necessary for the Opinion here appealed to be rendered as if this new evidence did

not exist. This evidence, however, is of record and tells a damning story that will not fade.

In order to demonstrate that the Opinion reached its conclusion in spite of the newly presented evidence rather than based upon it, it is necessary to describe this new evidence and its significance.

**-a-**

### **The Evidence Presented with the Renewed Motion**

First, the Renewed Motion itself, Docket No. 2981 describes *the obliteration of an essential library of customer account records* in attached Exhibit “A,” the email exchange of Steven Sues and Jeff Marwil and Exhibit “B,” the email exchange of Richard Anter and Natasha Brandt, with supporting documentation. Exhibit “C” to the Renewed Motion, includes an example of Level Propane’s Tank Discrepancy Report. These reports were generated by the drivers as they made customer deliveries. Their purpose was to maintain a complete record of all the customers, all the customer locations, all the customer tank locations and all the leased tank serial numbers. Also in Exhibit “C” is an example of an Ohio Personal Property Tax Return and Schedule 2. Ohio Personal Property Tax Returns are filed for each county. Thus, Attorney Brandt could not file them without knowledge of each tank’s *actual location*. This required that each tank be identified with a particular customer. The only means of such identification of the tank with the customer was by means of the tank serial number.

The exchange between Mr. Sues and Attorney Marwil resulted in a decision to keep the correlation of the customer identity and the tank serial number from the tank lessors. The exchange between Mr. Anter and Attorney Brandt resulted in the disposal off-premises of the hard copy version of the information that Mr. Sues and Attorney

Marwil had decided would be kept from the equipment lessors. Mr. Sues's decision was made despite the fact that the correlated list was vital to the company. All the while existing correlated data, the Tank Discrepancy Reports, was simply unacknowledged, and thus, for purposes of the bankruptcy, ceased to exist. These exchanges took place and these decisions were made the same day, January 13, 2003. Just days before, the equipment lessors had filed an adversary proceeding seeking equitable subordination of the Bank Group.

Here, the dates and times of the exchanges were specific, the subject matter was clearly identified and the purpose of the conduct was explicit. There can be no dispute that the subject in both sequences of emails was the records of tens of thousands of customers and tens of thousands of leased tanks. It was clear from these exchanges that the scale of the documentation is massive: many tens of thousands, if not millions, of customer records. The records subject of the in the Anter-Brandt email sequence were unmistakably the tens of thousands of envelopes kept as the customer account reconciliation library.

The subject of the Sues-Marwil email sequence was the customer database records, a specific concern of Attorney Marwil. The record in which the customer accounts are associated with the leased tanks, *identify the customer base that was at the very core of the business*. Customers with leased tanks do not change suppliers without changing tanks, indeed they are precluded from doing so. The decision to dispose of the hard-copy customer account reconciliation library, *the hard-copy record establishing the Debtor's going-concern value*, was made the very day that Mr. Sues and Attorney Marwil decided not to correlate customer identity and account information to the tank

serial numbers in order to keep that information secret. The Opinion insists that the Renewed Motion “relied on substantially the same evidence” as the first, despite this evidence that specifically identified deliberate agreement to take action that compromised customer records among those who should certainly know what they were doing.

**-b-**

**The Evidence Presented with the Third Supplemental Submission to Renewed Motion**

The Third Supplemental Submission to the Renewed Motion, Docket No. 2987, described the disappearance of the “MODI” database protocol required to retrieve all the customer transactions prior to April, 2002, simply vanished from the Level system, in its Exhibits “B” and “C”. First Dick Anter (Exhibit “B”) urgently informed John Verbos by email that the MODI protocol had vanished and then, minutes later, Art Hulsman (Exhibit “C”) emailed John Verbos that he explained to Mr. Anter that these transactions could never be retrieved again using the MODI SQL<sup>1</sup> or any other protocol, and asking Mr. Verbos to meet with Mr. Anter to determine how these records might otherwise be found.

The disappearance of the MODI protocol coincidentally with the Examiner’s

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<sup>1</sup> Mr. Hulsman in his email to Dick Anter explained “And since the data is not in the Modi SQL table it is gone but they want to meet about it as soon as you are available to see if there are any other ways to find it.” The Modi SQL table to which Mr. Hulsman referred was the data table that was part of the SQL (Structured Query Language) program installed by Anthony Farranacci (who had graduated first in his class in electrical engineering) at the request of Mr. Maloof, as an overlay on the Advanced Digital Database (ADD) program. This SQL overlay allowed the ADD database to be replicated to accommodate the number of Level customers, which had exceeded the capacity of an individual ADD database. It was the SQL functionality that was disabled so data predating April, 2002, could not be retrieved in the system. The MODI functionality could not be adjusted as to date, rather customer records could be purged from the system so long as 1) the account had a zero balance – with nothing owed by or to the customer – and 2) the account had no transactions within the past 60 days. The SQL functionality, by contrast, could be limited by date so that data while still within the database would be inaccessible if it fell outside of defined date ranges.

Request for Production (Docket No. 2987 Exhibit “A”) necessary to retrieve customer accounts tank serial numbers and transactions prior to April, 2002 strongly suggests that John Verbos knew that the MODI protocol had been destroyed, because it was he who destroyed it, and he destroyed at the instance of his direct superior. His direct superior was Steven Sues, CEO of the Debtors in Possession. As a direct result of Mr. Verbos’ handiwork, unresolved customer complaints piled up at Level at a rate of 4.75 per hour, as will be discussed below. It is clear that all but one of the backup tapes were destroyed, and from the data on that one saved tape account resolutions were surreptitiously made. This data was never retrieved, nor were the tapes on which it was stored.

With these records irretrievably lost, the record of the existence of *tens of thousands of customer tanks was likewise irretrievably lost*. When Amerigas, only a few months later, purchased the remains of Level Propane from Horizon, they received tens of thousands of stolen tanks with customers, which they so much as acknowledged when they stated to the trade press that they did not know how many customers came with Level Propane, while praising with nothing short of wonder Level Propane’s computer and satellite communication system (Docket No. 2987 Exhibit “D”). The Opinion insists that the Renewed Motion “relied on substantially the same evidence” as the first, despite this evidence that specifically identified a specific event and its significance to the apparent going-concern value of Level Propane.

-c-

**The Evidence Presented with the Fourth Supplemental Submission to Renewed Motion**

The Fourth Supplemental Submission to the Renewed Motion, Docket No. 2988, describes in Exhibit “A” how, having disabled the database and having destroyed the hard copy library of customer accounts, Level Propane’s managers arranged to manipulate the customer count. Severed from the tank serial numbers, the record of tanks Level Propane leased to its customers, the customer accounts can be sieved through whatever screen the managers require to bring down the customer count to the lowest possible plausible number. John Verbos, who disabled the ADD database a few days before, now endeavored with Eaglerock to drive the apparent value of Level Propane down still further with this transparent manipulation of data. Mark Williams, an Eaglerock manager, directed Mr. Verbos’s efforts. This manipulation served to further mask the identity and location of the leased tanks by *shrinking the customer count below the actual number of leased tanks* while stripping the company of customers to make it appear a tattered shadow of the former enterprise. The Opinion insists that the Renewed Motion “relied on substantially the same evidence” as the first, despite this evidence that specifically identified deliberate action that so compromised customer records that the location of customer tanks was rendered all but an impossibility.

-d -

**The Evidence Presented with the Fifth Supplemental Submission to Renewed Motion**

In the Fifth Supplemental Submission to the Renewed Motion, Docket No. 2989, on August 18, 2003, the United States Trustee asked that the customer list under Court seal be destroyed Exhibit “A.” After months of unceasing labor in butchering what had

been Level Propane, the Eaglerock managers have succeeded in all but destroyed its going-concern records. There are *now fewer customers of record than there are leased customer tanks on the ground*, behind customer houses. Tens of thousands of customer tanks bearing the Level logo were scattered throughout its territory, but no one – not Level management, not the Equipment Lessors, nor indeed the Bankruptcy Court – had any idea where any of these tens of thousands of tanks were located. No one knew because the record of the tanks’ location had been systematically destroyed. The account reconciliation library had been out of the building since January, 2003; the MODI SQL database functionality that made it possible to access customer accounts had been stripped from the system since April, 2003; and thousands more customer accounts had been hand-purged continuously since the MODI functionality was disabled, when the system held the last remaining record of the location and serial number of customer tanks.

In August, 2003, the United States Trustee asked that the customer list under Court seal, what might well be a last intact list of customers in existence, be destroyed. Since the list was under seal, its contents could not be argued. But there is no doubt that this list was a last chance for an intact count of customers and was itself a last chance for any identification of customer tank locations. No customer list was part of the Examiner’s evidence. Without this last list, there was no record outside of the control of the Debtor-in-Possession management against which to test the integrity of its customer records. The Opinion insists that the Renewed Motion “relied on substantially the same evidence” as the first, despite this evidence that demonstrates a keen awareness of the significance of the customer count and the customer records by Steven Sues, who ran the Debtors in

Possession as its CEO and was well aware of the previous steps taken to hide both customer tanks and customers.

-e-

**The Evidence Presented with the Sixth Supplemental Submission to Renewed Motion**

The Sixth Supplemental Submission to the Renewed Motion, Docket No. 2995, put the Statement Under Penalty of Perjury made by Suzanne Arena, on the record as its Exhibit "A." Ms. Arena, as she stated, was present for both the disappearance of the hard-copy customer account resolution library, first brought to this Court's attention as Exhibit "B" to the Renewed and Restated Motion to Reopen Examiner's Investigation and Appoint New Examiner, Docket No. 2981, and for the disabling of the customer database, first brought to this Court's attention in your Movant's Third Supplemental Submission in Support of his Renewed and Restated Motion to Reopen Examiner's Investigation and Appoint New Examiner, Docket No. 2987.

Ms. Arena states specifically that the MODI functionality was disabled on April 21, 2003 (see Paragraph 3, Exhibit "A.") She was then given exacting instructions with respect to her participation in Mr. Verbos' furtive retrieval of customer records when customer disputes requiring resolution compelled that resort be made to customer account records that apparently had vanished from the database (see Paragraphs 4-8, Exhibit "A.") The steps taken to maintain the secrecy of the very existence of these accounts, including that Ms. Arena cease communication of the disputed accounts by email (see Paragraph 6, Exhibit "A") belied any mishap or mistake in the disabling of the MODI functionality (see Paragraph 3, Exhibit "A.")

The procedure that Mr. Arena describes in Paragraphs 4-8 of her statement, Docket 2995, Exhibit "A," emerged as follows: her first communication to Mr. Verbos was by email, Exhibit "B," of only the numbers of the customer accounts requiring research. She was then specifically instructed to communicate further batches of customer account numbers on paper, and never again by email. Mr. Verbos then would return to Ms. Arena *on paper the following morning* the customer account information required that pre-dated June, 2002. Finally, early in June, 2003, Mr. Verbos accessed the account information pre-dating April, 2002 on a computer in his office and at a computer at Mary Shoup-Masaitis' work area that had access to a separate hidden database.

From her statement there can be no mistake that the customer database still existed, *with tank serial numbers*, since the vast preponderance of Level's customers leased tanks from Level. The extraordinary steps taken to maintain the secrecy of these hidden accounts (see Paragraphs 4-8, Exhibit "A") is entirely consistent with intentional conduct, whether in order to drive down artificially the customer count or to hide leased tanks *that sat in customers' back yards*, from the Equipment Lessors, by making it *impossible to identify the location of leased customer tanks over an area covering 14 states*.

Ms. Arena also states that indeed the customer account resolution archive library vanished the last week of January, 2003 (see Paragraphs 9-12, Exhibit "A."), shortly after the Equipment Lessors filed their Complaint for Equitable Subordination. Thus your Movant inferred in good faith and with good cause from the email exchange first presented to this Court with his renewed Motion that it was indeed this customer account resolution archive library that Mr. Anter suggested be removed from the building, and

Ms. Brandt referred to as a fund-raiser for her church. When Ms. Arena and her co-workers (named in Paragraph 12, Exhibit "A") were permitted back in the archive room, fully 90% of the records previously there were gone. As a result, the customer disputes that arose in the ordinary course of business could not be resolved because the means to do so had vanished. Even atrocious, disastrously foolhardy, business judgment cannot innocently account for this executive decision.

The Movant here presented new evidence that became available to him only on July 21, 2006, new evidence from a party, Suzanne Arena, whose existence he could not have been aware before he was recently provided with her name, in that he was banned from Level Propane headquarters by the Entry converting this case to a Chapter 11 proceeding in June, 2002. The Opinion insists that the Renewed Motion "relied on substantially the same evidence" as the first, despite this new witness with this new evidence that specifically identified the steps taken to operate the going concern with a concealed customer database, and the painstaking steps to maintain the concealment of this customer database.

**-f-**

**The Evidence Presented with the Seventh Supplemental Submission to Renewed Motion**

The Seventh Supplemental Submission to the Renewed Motion, (Docket No. 2997) puts Suzanne Arena's Statement of July 30, 2006 on the record. In this statement, she describes how the customer database was disabled on April 21, 2003, so that customer accounts pre-dating April, 2002, were rendered inaccessible and hidden. This disabling of the database coincided with the arrival of warm weather, when calls for

propane almost altogether fell off, so that there was minimal need for these customer account records. These customer accounts pre-dating April, 2002 remained hidden throughout the time of the Examiner's investigation of May, 2003 and remained hidden even after Eaglerock Propane purchased the assets of Level in July, 2003.

Somehow, the customers that had been hidden on April 21, 2002, had to be taken out of hiding, since each of them had a leased customer tank associated with the account, and each account itself had value arising from the fact that only the owner of a tank is permitted by federal statute to fill it. The scale of this project cannot be underestimated: because Level as the owner of each customer had the exclusive right to fill each such customer tank, each account was worth conservatively \$2,000. Because 35,000 customers were hidden when the database was disabled, at least \$70MM is involved.

To simply restore the functionality would raise questions for which there was no ready answer. Instead, these hidden customers were taken out of hiding under the cover of a marketing campaign to win back old customers, see Exhibit "A," Suzanne Arena's Statement of August 1, 2006. In Ms. Arena's statement, she describes the formation of a Tank Recovery Committee by Andrew Green, see paragraph 1 and 2 of Exhibit "A." Among its members were Suzanne Arena and Natasha Brandt.

This Committee was given the task of contacting the customer accounts predating April, 2002 and inviting them to return as Level customers. She stated that the customers who would be contacted would respond to the invitation to return to Level by stating that "they still had our tanks in their yards and were still customers," see paragraph 4 of Exhibit A. When she reported this to Mr. Green, he insisted that the project continue.

*Because she was unable to participate in such a sham, she resigned from the Committee and asked that another person be put in charge of the project.*

This statement describes the events that close the story which began in January, 2003, when the customer account reconciliation library was removed from the building and continued with the disabling of the customer database to exclude accounts pre-dating April, 2002, on April 21, 2003, the date the Examiner was appointed, and continued as account information was furtively retrieved, see Suzanne Arena's Statement of July 30, 2006, to avoid the restoration of the these hidden customers and leased tanks to the database. This evidence points to events that together exclude unfortunate coincidence and demands investigation. The Opinion insists that the Renewed Motion "relied on substantially the same evidence" as the first, despite this evidence that specifically identified an organizational effort to restore to view *sub rosa* the customer database, by maintaining the appearance of an effort to recover customers who, in fact, never closed their accounts with Level Propane.

**-g-**

**The Evidence Presented with the Eighth Supplemental Submission to Renewed Motion**

The Eighth Supplemental Submission to the Renewed Motion, Docket No. 3013, put an email from Mark Schlachet to Jaffrey Schwartz and William Schonberg, then all of Benesch, Freidlander, Coplan & Aronoff (BFCA), who represent the Debtors. Mr. Schachet's email was written on January 13, 2003, three days after the Equipment Lessors filed their Equitable Subordination action against the Bank Group in this case. This is the very day that Mssrs. Sues and Marwil determined that none of the leased

customer tanks would be correlated to the customer accounts and the very day that the discussions between Mr. Anter and Ms. Brandt concluded regarding the disposition of the hard-copy customer account reconciliation library, the email Exhibits “A” and “B” to the Renewed and Restated Motion to Reopen Examiner’s Investigation.

In this email Mr. Schlachet states clearly that he has been witness to the domination of Level Propane by the Bank Group and to the use of BFCA as an instrumentality of that domination. In this email Mr. Schlachet states clearly to Mr. Schwartz that the Bank Group has used BFCA as its instrument with active participation of Mr. Schwartz. Moreover, Mr. Schlachet states unequivocally that BFCA has been an instrument of the Bank Group since before the involuntary petition was filed June 6, 2002.

Mr. Schlachet’s email brought the evidence in the Renewed Motion full circle: where Suzanne Arena’s statements have addressed the utter destruction of the going concern’s business records and the concealment of 35,000 customers that set up Mr. Jacobs’ Eaglerock Propane to take over the Level Propane assets out of the frustrated *second auction*, this email of Mr. Schlachet addresses the scuttling of the *first auction* and the “entry of the Richard Jacobs on the scene.” The Opinion insists that the Renewed Motion “relied on substantially the same evidence” as the first, despite this further evidence demonstrating a coordinated effort to keep the affairs of Level Propane under the tight control of a dominant creditor.

In conclusion, the evidence brought forth in furtherance of the Renewed Motion clearly and specifically indicated who, what, when, where and why conduct took place that crippled Level Propane as a going concern. That this evidence was placed on the

record as the moving party discovered it was undisputed in the Opinion. That this evidence was simply unaddressed in the Opinion despite its significance and its significant differences from that presented in the original motion is simply unexplained. The Opinion rests on the parenthetical observation that the Renewed Motion “relied on substantially the same evidence,” going so far as to state that “As the Debtor correctly contends, these incidents were thoroughly investigated by the Examiner appointed by this Court.” The Examiner’s Report is entirely silent as to: the customer account reconciliation library, the disabling of the customer database, and the establishment of the Tank Recovery Committee. The Examiner investigated none of these incidents; indeed the Tank Recovery Committee began its operation after the Examiner’s Report was docketed. Under these circumstances, where there is substantial evidence of further events, the application of the law of the case is simply impossible.

## CONCLUSION

The Opinion subject of this appeal made a failed attempt to apply the doctrine of law of the case. In order to apply the doctrine successfully, the law of this case had to be first identified, *In re Knight, supra, Craft, supra*, which the Opinion failed to even attempt. Had the Opinion identified the law of this case, it would then be required to address the evidence presented in furtherance of the Motion. Instead, In its attempt to apply the doctrine of law of the case, the Opinion did not reject the new evidence, but proceeded as if the new evidence was never of record. As such, the Opinion was a thorough-going legal failure.

Respectfully Submitted,

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SERVICE

I hereby certify that on this 17th day of January 2007, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/David C. Eisler

David C. Eisler, Counsel for the Appellant