

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

In Re:	)	Case No. 07-CV-0153
	)	
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 REPLY BRIEF**

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## **Introduction**

The Appellees attempt to overwhelm with arrogance those facts that are beyond dispute, and to wrench doubt out of disputes over details when the story set out in support of the Motion is clear. The Appellant's Motion addresses the false promises made to the Appellant in order to induce him to participate in a stipulation that was itself a fraud upon the court. The stipulation was put into court to advance a scheme that had initiated pre-petition and concluded post-petition with the sale of the going concern assets of Level Propane to Horizon Propane and then to Amerigas, the ultimate owner.

The Appellant spoke to events preceding the involuntary bankruptcy not simply for color but to demonstrate that the Stipulated Order of June 11, 2002 was undertaken to maintain the position that the Bank Group sought to attain, and finally succeeded in so attaining on March 7, 2002 with the execution of the Forbearance Agreement by which John Rudd of Newmarket Associates was installed as CRO. The Appellant spoke to events that followed the Stipulated Order not for color but in order to complete the picture of the fraud perpetrated by the Bank Group upon the Court. The continuity of the participants in these events pre-petition and post-petition, pre-auction and post-auction, is entirely too telling to be mere coincidence. The consistent nature of the conduct of these participants is likewise too telling to be mere coincidence.

In this reply, the Appellant will demonstrate that Bank Group pursued and attained ends, the dismemberment of Level Propane on its terms, and the unchallenged installation of its management to accomplish this dismemberment, it could not otherwise attain. It is the Appellant's contention that the Chapter 7 involuntary petition was filed in order to cover for its seizure of Appellant's stock voting rights, and that the most

important terms of the Stipulated Order were the ratification its choice of Charles Sweet as the sole director, the ratification of the Chapter 7 involuntary petition, and the physical exclusion of Appellant from the business premises.

By means of the Agreed Order, the Bank Group effected complete operational control over Level Propane. With such operational control, the Bank Group was able to hide tens of thousands of customer tanks in plain sight and purge tens of thousands of active customers from the Level Propane database so that their accounts could be surreptitiously conveyed to the ultimate owner of the Level Propane assets, while driving the value of the going concern so far down that the Appellant not only would see nothing from the sale of the assets, despite the established value of the business immediately pre-petition, but that the Appellant would be burdened with a judgment debt so great that he could never pose a challenge within the propane industry again. A ruthless and energetic campaign has so far yielded their intended results. The Appellant comes to Court to see the results of this campaign undone.

Preliminarily, bear in mind that the events narrated in the Motion were verified by the Appellant, see “Statement Under Penalty of Perjury of William H. Maloof,” Motion Exhibit “A,” so that the narrative of the events in which the Appellant was a participant was supported by his signed statement as evidence. Thus, every event narrated in which he was a direct participant was supported by his statement under penalty of perjury. Thus there is little occasion to refer to the bankruptcy record, as such, because the Appellant was directly involved on the one hand, and the matters alluded to post-petition, particularly as to the customer database and the purloined customer tanks, were matters that, by their very extra-legal nature, that were kept off the bankruptcy record. Bear in

mind also that the Examiner's Report remains redacted, in defiance of Court order, see Examiner's Report Exhibits 108A and 109A.

To the extent that the Appellant was promised anything in the Agreed Order, the promises were all keyed to assurances that the Debtor would operate free of the past domination of the Bank Group. The assurance that Rudd would not be hired by Level Propane as Debtor responded to Rudd's biased stewardship of Level Propane prior to the filing of the petition. The assurance that Benesch Friedlander Coplan & Aronoff (BFCA) would be replaced by other Debtors' counsel responded to their conflicted pre-petition loyalties: to both the Bank Group, as evidenced by the Forbearance Agreement, and to Rudd, as evidenced by the firm's historic professional involvement with Rudd. The assurance that Development Specialists, Inc. (DSI) would be actively engaged as financial consultants was to place a party in control that was unaffiliated with the Bank Group. Finally, the assurance that the Appellant would be provided financial and other reports responded not only to the Appellant's rights as stockholder, but to assure he had the information required to test and maintain management's good faith. It is certainly sufficient that he states under penalty of perjury that despite specific request for such information it was denied to him. The Appellees admit that this information was denied the Appellant as much when it states that the operating reports on the docket satisfied this assurance, putting the Appellant in the position of a member of the public who was not party to the Agreed Order, see Appellees' Brief at 25.

**Prejudice Remained Unaddressed in the Attempt to Bar The Motion to Vacate  
by Means of the Doctrine of Laches**

In the application of the doctrine of laches, the issue is not delay, but prejudice: “The test of laches is prejudice to the other party.” *Gutierrez v. Waterman Steamship Co.* 373 U.S. 206 (1963) at 215,. Prejudice to the non-moving party may be occasioned by delay, but it is prejudice that is at the heart of laches and what laches addresses by means of its strictures, *Costello v. United States* 365 U.S. 265 (1961), *Gardner v. Panama Railroad Co.* 342 U.S. 29 (1951) *Robin Island Preservation Fund v. Southold Development Corporation* 959 F.2d 409 (2d Cir, 1991) *Stone v. Williams*, 873 F.2d 620, 622 (2<sup>nd</sup> Cir., 1989). In each of these cases, prejudice to the non-moving party was the essential test of whether an action or pleading would be barred on the basis of delay. In *Costello, supra*, laches was turned away as a defense in a denaturalization proceeding because Costello could not overcome his career as a bootlegger during the 1920s in any event, in *Gardner, supra* the defense of laches was turned away because the steamship company could defend itself as well in 1950 as at the time of accident giving rise to the lawsuit and Gardner had attempted to press her claim continuously since her injury, in *Robin Island, supra*, laches was applied because the defendant had every right to depend on undisturbed record title that stretched back 200 years, and in *Stone, supra*, laches was applicable only after the Plaintiff had known of her claims to the copyrights for some years and, during her silence, the copyrights had been licensed to a multitude of different defendant parties.

Here, prejudice to the non-moving party was never addressed. Appellant maintains that he had only recently come into possession of facts that made his claim

possible and that he has pressed his opposition to the Bank Group's domination of the Debtors throughout the bankruptcy. His ability to obtain evidence supporting his claims has been governed by the strictures of the Agreed Order that banned him from contact with employees of the Debtor, see Agreed Order at 8. Thus, he simply could not have known of either Suzanne Arena or Samantha Whitesel until either chance or their own volition brought them to his attention. Any ability he may have had to monitor the businesses of the Debtors was limited by the facts that he was banned from the premises and forbidden to contact Debtor employees. Any assessment of due diligence must be made in light of this circumstance. More importantly, the determinative issue of prejudice was never addressed because prejudice could not be demonstrated. The only party responding to this Motion were the Debtors, which, as he has already observed, stood only to gain rights were the Motion to Vacate granted.

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**SUBSEQUENT EVENTS DEMONSTRATED THAT THE BANK GROUP HAD NO PRESENT INTENTION TO KEEP ANY OF THE PROMISES IT MADE TO APPELLANT IN ORDER TO INDUCE HIM TO JOIN THE STIPULATED ORDER OF JUNE 11, 2002.**

Appellant has always maintained that the test of whether the Bank Group committed fraud was whether events proved that they kept their promises to Appellant. There can be no other test of representations of future fact than the future.

-a-

**NewMarket Partners and John Rudd Actively Participated in the Management of Debtor Level Propane Contrary to the Clear Undertaking of the Agreed Order of June 11, 2002.**

The clear contemplation of the provision was that neither Rudd nor Newmarket would manage the affairs of Level Propane, as they had pre-petition. This was the clear

import of the provision that the “Debtors shall not seek to engage or re-engage John Rudd or NewMarket Associates in the Chapter 11 Cases.,” Agreed Order at 8. His involvement, if any, was to be limited to a consultant to the Bank Group. The Order Authorizing the Post-Petition Credit Agreement, Docket 166, dated July 25, 2002, provides in relevant part, that:

“The Debtors shall permit representatives, agents, and/or employees of (i) the Prepetition Agent, the Prepetition Lenders, the Post-Petition Agent and the Post-Petition Lenders . . . to have reasonable access to their premises and their records during normal business hours . . . and shall cooperate, consult with and provide such persons all such non-privileged information as they may reasonably request. . . .” at p. 33, Paragraph 25.

When in the email attached as Exhibit “B” to the Supplemental Submission in Support of the Motion to Vacate (Docket No. 2984), Alan Omori remarks that “Here is my budget. It needs to be noted that it was altered by New Market.” Natasha Brandt responds that: “Note that Parry Geitgey is adamant about this budget being overstated, even with the concessions.” This exchange demonstrates that Ms. Geitgey, part of the NewMarket team that was the representative of the Post-Petition Agent and Lenders was dictating the size and scope of the budget. By any reasonable view of the events, this relationship is no longer cooperation and consultation. This is domination of the kind that Order of June 11, 2002 was meant to prevent. If the Debtor was forbidden to engage or reengage Rudd or NewMarket, in order to prevent domination by the Bank Group, then domination of the Debtor by the Bank Group through NewMarket as its representative could be no more tolerated under the Order.

Further, the Statement of Jeff Kessler, the Accounts Receivable and Cash Collection Manager for Level Propane both pre-petition and post-petition, Appendix

Exhibit “D” is unequivocal in stating that Patty Geitgey was an active manager of Level Propane from the time it was placed into bankruptcy to the time of the sale of its going concern assets, directly flouting the terms of the Agreed Order. It is clear that NewMarket acted on the Bank Group’s part to dominate post-petition as it had pre-petition. Such conduct was in clear violation of the June 11, 2002 Order, which, in light of all the other violations, was clearly a promise made to the Appellant with no intention to keep at the time it was made.

-b-

**The Bank Group Never Had a Present Intention to Limit BFCA to an Interim Engagement as Debtors’ Counsel as Represented in the Order of June 11, 2002.**

While Charles Sweet may protest as to his intentions (Appellees’ Brief at 26), the deposition of Brian Salvagni makes it clear that Sweet acted in accord with the fixed intention of the Bank Group to maintain BFCA as Debtors’ counsel:

“A. It was abundantly clear that Benesch wasn’t going willingly or easily.  
“Q. What was your understanding of Mr. Sweet’s position on that issue?”  
“A. At first I thought he was ambivalent about the representation of – first I thought he was ambivalent about transitioning out. But as we moved into the end of June it was clear to me that Mr. Sweet didn’t have any intention of getting them out, either.” TX at 54, ll.10-19.

Thus, Mr. Salvagni testified that Mr. Sweet at no time evinced a commitment to replace BFCA, being never more than “ambivalent.” This ambivalence gave way to commitment to BFCA within a matter of days, as mid-June gave way to the end of June, 2002. That this ambivalence was actually an undisclosed commitment to retain BFCA is made clear by the Memo of Jeffrey Schwartz, dated *June 21, 2002*, (Examiner’s Report Exhibit Vol. A, Tab 174) he stated in the facts:

“Management *has discussed* with Debtors’ lenders the difficulties in replacing BFCA as Debtors’ counsel and . . . has therefore, *at the request and with the consent of petitioning creditors and senior lenders (and the*

*Creditors Committee, hopefully*), revisited the provision limiting BFCA's engagement herein, as contained in the Court's Agreed Final Order entered on June 11, 2002, and has determined to seek a revision of said Order . . . ." at 1, emphasis supplied.

It is clear from these statements, one under oath and another a memo written for distribution within BFCA, that the Bank Group intended to limit BFCA to an engagement as Debtors' counsel is contrary to the facts. There is simply too narrow a window between the date of the Order, the date of the Schwartz Memo, and the time frame established by Mr. Salvagni's testimony for Mr. Sweet to have had such a sudden change of mind. Moreover, as the Schwartz Memo disclosed, it was "at the request and with the consent of the petitioning creditors" that the provision limiting BFCA's engagement was revisited. Thus, the evidence abundantly and clearly supports the contention of the Appellant: the Bank Group had no intention to limit BFCA's engagement at the time it made its promise in order to induce Appellant to join the fraudulent stipulation of June 11, 2002.

-c-

**The Fee Bill of DSI Discloses that it was Neutralized Within Weeks of Its Engagement in Breach of the Representation Made to Appellant to Induce him to Join the Stipulated Order of June 11, 2002.**

The "FIRST AND FINAL Application for Compensation and Reimbursement of expenses for Development Specialists, Inc June 17, 2002 through September 30, 2002. Filed by Development Specialists, Inc." (Docket No. 724, filed October 30, 2002) shows how DSI was neutralized. Its very description of its employment states that its role shifted from management to sale as they abdicated their assigned role:

"DSI's role shifted from a central role involving the operations of the Debtors to a role with an emphasis on managing the sale due diligence

process numerous potential buyers and interested parties.” Docket 724, at p. 2, ll. 23-26.

Nearly 50% of its time was taken up by Item E, Business Analysis, and Item L, Sale of Assets. Its initially active management role quickly gave way to presentation of the going concern to prospective bidders in the September 23, 2002 auction. A review of the activities under Item E shows that their efforts were focused on maintenance of ongoing operations. Item L involved exclusively the sale of the going concern assets. Item M, Secured Lenders/Cash Collateral, absorbed another 17.12% of DSI’s time.

“Much time was spent with NewMarket Partners, the secured lenders’ on-site advisors, regarding the status of day-to-day operations, staffing and retention,” Docket No. 724, at 11, ll.19-21.

Thus, nearly 80% of its billed time was spent providing analysis, stabilizing the operation immediately after the petition’s filing, preparing the Secured Lenders for their management role and gathering and presenting the data to prospective bidders at the September 23, 2002 auction of the going concern assets. Its role with the Debtors terminated September 30, 2002. The Appellant observes that DSI’s involvement with Level Propane ended almost simultaneously with BFCA’s permanent appointment as Debtors’ counsel.

In its brief career at Level Propane, it spent 80% of its time in analysis, fact gathering and sale preparation. Add to this 80% the 8.96% of its time spent on accounting (Docket 724, at 7, Item D), fully 89.96% of its time was spent on matters clearly outside the scope of operations management in their stipulated role as “financial consultants,” Agreed Order at 9. No category was billed related to operations management, and the remaining 10% was absorbed by its roles as intermediary between the various parties in the bankruptcy, see Items N, O, and P, while another 5% was directly related to due

diligence related to the sale, Item J. In short, while DSI was in fact engaged, by its own statement its time was spent on matters outside its role stipulated in the Agreed Order. There can be no dispute that its role was governed by management of the Debtor, installed by the Bank Group, and that much its time was spent readying the Bank Group's consultant, "NewMarket Partners," for its active role in the management of the Debtors. To represent that DSI was deployed as represented in the Agreed Order is simply impossible.

**-d-**

**The Appellant's Requests for Financial and Other Information Were Refused, Contrary to the Representation Made in the Order of June 11, 2002.**

The Appellees state that Appellant provided no evidence that his requests for information were refused. The Order provided in pertinent part that:

"The Director and the Debtors shall transmit to Maloof at his home address financial and other information reasonably requested by Maloof in form and content consistent with the generation of such information by the Debtors in the ordinary course of their businesses," Order at 7.

The Appellant in his Statement of the Facts at Paragraph 24 states that this provision was violated by the Debtors. As further corroboration of their refusal to provide financial and other information, the Appellant submits his email exchange with the Debtors between August 15, 2002 and August 20, 2002 as Appendix Exhibit "A." The Appellant initiated the exchange with a request to Charles Sweet for his weekly reports, observing that he has not received them for two weeks. Mr. Sweet replies that he has forwarded the request to Steven Sues, "who should be able to help." Mr. Sues responds on August 20, 2002 to the message forwarded to him that:

"I will provide you on a weekly basis the same information I provide the banks and the unsecured creditors, namely the actual vs budget cash flow report, the weekly status report, and the operational performance report. . .

I do not intend at this time, however, to provide your specific individual requests.”

This makes abundantly clear that Mr. Sues had no intention of abiding by the provision of the Order, and his refusal is consistent with the refusal of the Bank Group-controlled Debtor to provide information to Appellant despite the Appellant’s requests from the effective date of the Order. The Order provided that information be provided as requested by Appellant, not that Appellant receive the information provided to the creditors committee. The Appellant’s emails further evidence that his requests were at first put off then firmly rebuffed as he persisted. It is plain that there was simply no intention to provide him with any reports, as Steven Sues’ final refusal to honor the Appellant’s specific information requests demonstrates.

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**The Agreed Order is Properly Subject to a Motion to Vacate Where the Moving Party Has, as Here, Been Fraudulently Induced to Enter into the Agreement and the Agreement Results in a Fraud Upon the Court.**

In his initial Motion, Appellant addressed the issue of agreed orders. He stated that because his signature was procured “ ‘by means of an wrongful threat precluding the exercise of free will’ ” *First National Bank v. Pepper* 454 F.2d 626 (2d Cir., 1972) at 633, quoting *Austin Instrument Co. v. Loral Corp.* 29 NY 2d 124, 130, 324 NYS 2d 22, 25, 272 NE 2d 533, 535 (1971), see also *Citibank, N.A. v. Real Coffee Trading Co., N.V., et. al.* 566 F. Supp. 1158 (S.D.N.Y., 1983), the stipulation was fraudulent and that he cannot be regarded as a participant in the stipulation. He finally compared the facts surrounding the execution of this Agreed Order to that in that in *United States v. Denham* 817 F.2d 1307 (8<sup>th</sup> Cir, 1987), in which record counsel for Denhams in a bankruptcy proceeding dealt on his own account to the detriment of the Denhams, thereby forcing

them to stipulate to an Order that would, if not challenged, cost them their residence. The Denhams moved that the stipulated order be vacated, arguing that they entered into it because their counsel had abandoned their cause to pursue his own interests long before, see at 1309. Observing that the attorney's abandonment of the Denhams was of the fraud asserted, the Court remanded the cause for trial on the merits, at 1310. Here, Appellant's counsel had abandoned Level Propane just days before, of which he was and is the sole shareholder and was the sole director and CEO, and were seeking permanent appointment as Debtors' counsel under the Bank Group's regime.

Moreover, as discussed in Appellant's initial brief, the fraud that interfered with the court's discharge of its judicial function was the false representation, made to the court itself, that the conversion to Chapter 11 administration was in order to preserve the estate's assets and the businesses' going-concern value when it, the Bank Group, had every intention of wrecking the businesses as was born out by the subsequent conduct of the officers installed by the Bank Group.

This species of fraud has been denominated extrinsic fraud:

“Fraud is regarded as extrinsic where it prevents a party from having a trial or from presenting his cause of action or defense, or induces him to withdraw a defense, or operates upon matters pertaining not to the judgment itself, but to the manner in which it was procured,” *Chisholm v. House* 160 F2d. 632, 643 (10<sup>th</sup> Cir., 1947), see also *United States v. Throckmorton* 98 U.S. 61, 67 (1878).

It is exactly this extrinsic fraud that characterized the Bank Group's conduct and makes the Agreed Order the result of a fraud upon the court.

**The Conduct of the Officers of the Debtor was an Essential Part of the Fraud Upon the Court in That Their Conduct was Essential to Completed the Scheme Initiated in Bankruptcy Court by the Fraudulently Procured Agreed Order.**

The Appellees attempt to distinguish this case from *Gumport v. China Investment Trust and Investment Corporation (In Re Intermagnetics America, Inc.)* 926 F.2d 912 (9<sup>th</sup> Cir., 1991) and *First-Union Nat'l Bank v. Tenn-Fla Partners (In re Tenn-Fla Partners)*, 170 B.R. 946 (USBC, WD TN, 1994). Because the Order here sought to be vacated is part of an ongoing course of conduct, which, as your Appellant has recently found out, included rendering over of the rights to customer payments to Amerigas before the going concern was even sold to Horizon, that is to say, while the going concern, with its stripped customer database, was still under the jurisdiction of the bankruptcy court, see Statement of Samantha Whitesel, Appendix Exhibit "B," the conduct of the Debtors' officers is no less a part of the fraud upon the court than the fraudulent Agreed Order. Further, the Statement of Jeff Kessler, Accounts Receivable and Cash Collections Manager for Level Propane, both pre-petition and post-petition, Appendix Exhibit "D," discloses that massive amounts of money from previous months' activity, of a volume seen only during the winter heating season, flooded into his department from June 27, 2003 until the date that Debtor's going concern assets were sold to their ultimate purchaser, Amerigas. This statement indicates that not only were customer tanks were stripped from the database, but that the customers themselves were surrendered to Amerigas during the 2002-2003 heating season, without any party or the Bankruptcy Court being informed of this massive transfer of customers. This newly discovered information cannot be understated. The activity discussed in this statement is proof

positive of a direct financial relationship between the Debtor and the future purchaser. All of this activity took place behind the back of the Bankruptcy Court.

The Order here sought to be vacated was the necessary predicate to that part of the scheme, but nonetheless all of this conduct is part of a single scheme for which there must be a remedy. To vacate the Agreed Order and grant leave to controvert the Chapter 7 involuntary petition is the remedy available to a party seeking relief for these outrages in bankruptcy. The evidence of conduct after the Order was entered is no less essential than the language of the Order itself, since the Order concerns itself with future conduct and can only be tested by subsequent events. The events prior to the entry of the Order are in like manner essential since they demonstrate that the Order was negotiated by the Banks to advance a scheme that had already been underway for a substantial period of time. Thus, not only is this case every bit the outrage condemned in *Intermagetics, supra* and *Tenn-Fla Partners, supra*, but is the very sort of “deliberately planned and executed scheme,” Appellees’ Brief at 16, to use the Bankruptcy Court as a vehicle for the wrongful domination of Level Propane as the offending party in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944), used the Patent Office to make a fraudulent claim on a glass blowing process. The events recited in the Appellant’s initial brief and in the Motion itself amply demonstrate the extent and the wrongful motivation for this domination of the Debtors by the Bank Group, which domination was maintained by the officers it installed.

By means of the stipulation, the Bank Group was able to work its unfettered will on the Debtors in Possession throughout the bankruptcy proceedings in order to continue its domination of Level Propane first secured by the March 7, 2002 Forbearance

Agreement. Management installed by the Bank Group was able to pursue a course of conduct altogether at odds with any sale or reorganization that was represented to the Court. The Bank Group, operating under the cover of the Chapter 11 proceedings, which left the day-to-day operation of the Debtors in Possession subject to their control and in the hands of their agents, was able to see to it that the hardcopy customer account reconciliation library was taken off-premises, see Appendix Exhibit "B," Statement of Samantha Whitesel, Appendix Exhibit "C," Statement of Suzanne Arena, that the customer database was completely compromised, Statements of Arena and Whitesel, and that the going concern was conveyed to Amerigas. The history of this case discloses that Amerigas did not bid on the going concern in September, 2002, but became the ultimate owner the following fall, in October, 2003. In the interim, a mock auction was held, and a management contract was given to Eaglerock Propane, while the Bank Group's officers remained in place. While under their control, Level Propane experienced its first out-of-gas crisis that left customers without fuel in the dead of winter, the hard-copy customer records were spirited off-site, the customer database purged of all pre-April, 2002 customers, and customer tanks that were behind customer residences were taken off the database, Supplement Submission in Support of Motion to Vacate, Docket 2984, while customer tanks were sold out of inventory in the field on an ad hoc fire-sale basis, Motion to Vacate at Paragraph 31. In April, 2003, Eaglerock Propane, and its assigned, Horizon Propane, entered an agreement with the Debtor to purchase its going concern assets. This sale was approved by the Court on June 27, 2003, Docket No. 1721 and closed June 28, 2003.

While still in the hands of Horizon Propane, customer payments were being directly paid over to Amerigas, who ultimately purchased the assets from Horizon Propane in October, 2003. Thus months before its purchase of the going concern, even before all of the going concern assets were conveyed out of the bankruptcy estate, payments were made directly to Amerigas, Statement of Samantha Whitesel. This could only have been possible with the full cooperation of the controlling party in this transaction, the Bank Group. This conduct not only parallels that described in *Intermagnetics, supra*, but should be as vigorously condemned. The Agreed Order was essential to retaining the control over the Debtor that the Bank Group had since March 7, 2002. Had the Bank Group chosen to complete the installation of a Chapter 7 Trustee, the Trustee and not the Bank Group would have controlled the Debtors. It is inconceivable that a Trustee would have done worse than the Bank Group in any attempt to sell the going concern when the ultimate sales price to Horizon Propane was \$21 Million, a fraction of its pre-petition appraised value, a fraction of the secured loan balance, a fraction the \$165 Million Star Gas offer of February, 2002, that was made after the completion of a full due-diligence, see Motion at Paragraph 12, and a fraction of the \$165 Million offer made by Ferrell Gas immediately before the involuntary petition, hidden by John Rudd, and communicated directly to the Appellant because neither Rudd nor Blair & Co. responded to Ferrell Gas' offer, Motion at Paragraph 22.

Since the conduct of the officers of the Debtors in Possession cannot be separated from the Agreed Order which put them in control, and the test of whether there existed fraud on the court was whether there was any intention to abide by any of the representations of going-forward conduct, conduct of the officers of the court subsequent

to the representations made in the Agreed Order must be the test of whether the Agreed Order was a fraud on the court. The Opposition is quick to claim that any misrepresentation to the Appellant is mere “fraud between the parties” and cannot be the basis of a claim of fraud upon the Court. Bear in mind however, that the fraud on the Appellant was the vehicle by which the Bank Group secured its continued control over the Debtors. Had the Appellant been entirely out of the picture, all that would have remained would be the Bank Group and the Debtors, the sole director of which, Charles Sweet, the Bank Group had installed only days before the Agreed Order. Thus, any stipulation would have been between the Bank Group and its agent, Charles Sweet. That is, between the Bank Group and itself. The Appellant was the only party to the Agreed Order independent of the Bank Group. In order to induce the Appellant to stipulate to the Order that continued the Bank Group’s control of the Debtors, some pretense that the Appellant had some voice in the conduct of the bankruptcy going forward had to be maintained. This pretense permitted the Bank Group to maintain its control over the Debtors, with the ratification of Charles Sweet as sole director, and ratification of the involuntary Chapter 7 petition, which to the moment the Appellant signed the stipulation, was still subject to controversion. With these two issues closed, the Bank Group was able to maintain its control over the Debtors and, contrary to its representation that the “assets and going concern of the Debtors will be preserved and protected,” gut the going concern and place its carcass in the friendly hands of Amerigas.

In light of all the forgoing efforts to retain control over the Debtor with the singular purpose of destroying its independence, the Appellees’ attempt to distinguish this case from *Hazel-Atlas, supra*, and *Demjanjuk vs. Petrovsky*, 10 F.3d 338 (6<sup>th</sup> Cir.,

1993) is at best disingenuous. In *Hazel-Atlas*, the crux of the fraud was a trade magazine article authored by counsel for the Hartford Empire, rather than the asserted author, the president of a trade union. Here, it is procurement of a stipulation by means of false promises. In *Demjanjuk*, government counsel failed to disclose exculpatory evidence critical to Demjanjuk's defense. Here, the Bank Group maintained the pretense that the Debtors were in any manner independent, despite obtaining the ouster of the Appellant, the only party independent of its domination, by means of false promises. Contrary to the assertion of the Appellees, the falsely procured stipulation of Appellant fits cleanly within the test for fraud set out in *Demjanjuk, supra*. Since Appellant cannot participate in the stipulation of June 11, 2002 when his signature was obtained by fraud, it leaves only the Bank Group and the Bank Group dominated Debtors to place the stipulation into Court. Essential to that stipulation was the representation that the proceeding will be conducted "in a manner that will preserve and protect the assets and businesses of debtors' estates," Agreed Order, at 7. As set out at length in this reply and in Appellant's initial brief, the Chapter 11 proceedings were conducted in a manner calculated to destroy the going-concern value of the Debtors' businesses, particularly that of Level Propane.

### **CONCLUSION**

In conclusion, for all of the foregoing reasons, that the Motion described an ongoing scheme of which fraud on the court was an essential part, that the fraudulent representations of the Agreed Order could only be demonstrated by subsequent events and that the subsequent events demonstrated that the Agreed Order was fraudulent both because the Appellant was fraudulently induced to join it and because the representation

made to the Court was itself fraudulent, the decision of the Bankruptcy Court must be overruled and Appellant's Motion to Vacate be granted.

Respectfully Submitted,

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SERVICE

I hereby certify that on this 1st day of March 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