

**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 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. Prior to the filing of the Chapter 7 creditor petition on June 6, 2002, the lead creditor of the Debtors, known as the Bank Group, of which Deutsche Bank Americas was the primary stake holder, had, pursuant to a Forbearance Agreement between the Debtors and the Bank Group signed on March 7, 2002, managerial control of the Debtors affairs through a Chief Restructuring Officer. In the event that the Chief Restructuring Officer terminated his employment for any reason, it would be an event of default. Among the remedies of the Bank Group in the event of default was its right to vote the shares of the Debtors' sole shareholder, the Appellant, William H. Maloof, to elect as Director a person of its choosing.

The Chief Restructuring Officer, John Rudd of Newmarket Partners, resigned his position effective June 3, 2002. On June 5, 2002, Appellant requested copies of the bankruptcy petition that had been prepared by Benesch Friedland, Coplan & Aronoff, LLP, (BFCA) concerned that the Bank Group would move to seize control of the businesses. On June 6, 2002, Benesch, Friedlander, Coplan & Aronoff, LLP withdrew as counsel for the Debtors, stating as its reason that Level Propane Gases, Inc. in its pursuit of pre-buy propane sales would violate various consumer protection laws because of what BFCA was Level Propane's insolvency. On the same day, June 6, 2002, the Bank Group exercised its right to vote the shares and elected Charles Sweet as the sole director of Level Propane Gases, Inc., Park Place Inc., and their affiliated companies, as well as of

WHM Emprises, Inc., their holding company. Appellant had yet to obtain the bankruptcy petition prepared by BFCA. Also, on that day, June 6, 2002, the Bank Group filed an involuntary Chapter 7 bankruptcy petition with the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division. On June 7, 2002, BFCA was hired by Charles Sweet to represent the companies as Debtors' counsel.

With that petition, the Bank Group filed a motion to appoint a Trustee. Negotiations were undertaken to avoid such an appointment, which might well have lead to a piece-meal asset liquidation of the businesses. On June 11, 2002, as a result of negotiations between the Bank Group, represented by their counsel, the Debtor, represented by BFCA, and Appellant, then represented by Richard Baumgart, who had been introduced to him by BFCA at their offices. As a result of these negotiations, the Agreed Order converting the case to a Chapter 11 voluntary bankruptcy was executed and presented to the Bankruptcy Court for signature and docketing. In order to induce Appellant to stipulate to the Order, he was promised the following: 1) That the Debtors would not engage Benesch, Friedlander, Coplan & Aronoff as permanent counsel for the Debtors; 2) That the Debtors would engage DSI as the Debtors' active financial advisors; 3) That Newmarket Partners, hired by the Bank Group as their on-site representative at the Debtors' place of business would not participate in any management decisions of the Debtors and 4) That the Appellant would be provided weekly financial reports of the businesses. The signatories, all officers of the court but the Appellant, also represented to the court that this conversion that the case would be conducted "in a manner that will preserve and protect the businesses and assets of Debtors' estates" (Stipulations at 7).

Each of the promises made to the Appellant to induce him to join the Agreed Order was broken. Further, as set out in detail below, officers of the Debtors-in-Possession, also officers of the court, acted to destroy the businesses of the Debtors and strip the Debtors' estates of their assets, contrary to the representation made to the Court that put these officers in control of the Debtors.

Toward the end of July, 2003, what remained of the assets of Level Propane Gases, Inc. was sold to Eagle Rock Propane, LLC, which sold these assets to Amerigas, LP in early October, 2003. In November, 2005, Appellant learned of fraud by officers of the Debtors. As a result of this, he was able to piece together the account of what had occurred, which account had eluded him theretofore. He had not been represented by counsel since July, 2002. On June 6, 2006, Appellant moved the Bankruptcy Court to Vacate the Agreed Order of June 11, 2002, pursuant to R. 60(b) (6), F.R.C.P. On November 28, 2006, the Bankruptcy Court denied his Motion. Appellant filed a timely Notice of Appeal.

## **STATEMENT OF THE ISSUES**

1) Whether the Bankruptcy Court erred in its application of the Doctrine of Laches when the doctrine when it was neither pled nor proven as an affirmative defense by the non-moving party and the Court failed to articulate any facts or circumstances to establish prejudice to the non-moving party.

2) Whether the Bankruptcy Court erred in its denial of Appellant's Motion to Vacate pursuant to Rule 60(b) (6), Federal Rules of Civil Procedure, when the Appellant demonstrated in the Motion that the Agreed Order of June 11, 2002, by which the Chapter 7 Proceeding was converted to a Chapter 11 Proceeding, was procured by fraud extrinsic to the Judgment.

## LAW AND ARGUMENT

-I-

### **THE BANKRUPTCY COURT ERRED IN ITS APPLICATION OF THE DOCTRINE OF LACHES WHEN IT WAS NEITHER PLED NOR PROVEN BY THE NON-MOVING PARTY AND THE COURT FAILED TO ARTICULATE ANY FACTS OR CIRCUMSTANCES TO ESTABLISH PREJUDICE TO THE NON-MOVING PARTY.**

The Opinion here appealed is premised on the doctrine of laches, when it has neither been pled nor proven by the party opposing the Motion. The invocation of the doctrine of laches, when it had not been either pled or proven by the opposing party is not only a judicial curiosity but a procedural impossibility. Every case decided with reference to laches, whatever its result, references it's pleading and proof by the opposing party as a procedural prerequisite for its consideration by the Court. The Rules of Civil Procedure specifically provide that laches as a defense that must be affirmatively plead and proven in order to be a basis for decision:

“In pleading to a preceding pleading, a party shall set forth affirmatively . . . *laches* . . . and any other matter constituting an avoidance or affirmative defense,” R. 8(c), F.R.C.P., (emphasis supplied)

Absent its pleading by the opposing party, the issue of laches cannot even be reached, see e.g. *Costello v. United States* 365 U.S. 265 (1961), *Gardner v. Panama Railroad Co.* 342 U.S. 29, (1951), *Gutierrez v. Waterman Steamship Co.* 373 U.S. 206 (1963), *In Re Levy* 256 B.R. 563, 566 (USBC, NJ, 2000). In *Robin Island Preservation Fund v. Southold Development Corporation* 959 F.2d 409 (2d Cir, 1991), the Defendant moved for summary judgment, pleading laches, *id.* at 415, because Plaintiff asserted its claim based on disputed title to real estate dating back to 1779, *id.* at 411. Here the Debtors, who opposed the Motion, argued that he came too late to court to argue fraud under 60(b) (3),

since he came after one year had passed. Nowhere did they invoke the doctrine of laches to avoid the claims made to support his Motion to Vacate the Agreed Order.

The Opinion invokes the doctrine of laches as the basis for denying the Motion to Vacate. Under this doctrine, “a court may dismiss an action where there exists inexcusable delay in instituting an action, resulting in prejudice to the non-moving party” at 6. Nowhere did the Debtors plead that the Motion was made after an inexcusable delay so that they, the Debtors, were be prejudiced by the resulting passage of time. Rather, the Opinion relies on the four year interval between the Agreed Order and the Motion to Vacate that Order, that the Appellant was represented by counsel during the negotiation of the Agreed Order and that “Maloof did not seek an adjournment of the meeting which resulted in signing of the Agreed Order so he could conduct his own investigation,” at 6. Counsel could be in no position to assess whether the promises incorporated into the Agreed Order would be kept, nor could any investigation ascertain whether promises of performance in the future would be kept.

Thus, the Opinion premises its assessment that the Appellant’s delay in bringing the Motion subjected it to the doctrine of laches on 1) the implicit assertion that his counsel would have discerned that his adversaries misrepresented their intentions and on 2) the explicit, and bizarre, assertion that he failed to investigate whether his adversaries were misrepresenting their intentions as to future conduct. In both instances, the Opinion calls upon the Appellant to do the impossible – to ascertain the future conduct of his adversaries and to assess their internal mental state that would only become manifest by their future conduct.

In closing its analysis, the Opinion states flatly: “Thusly, the doctrine of laches applies to the relief sought herein,” at 6. At no point in the Opinion is the factual basis for prejudice to the non-moving party articulated nor even addressed, in an inexplicable defiance of R. 52(a), F.R.C.P.

The doctrine of laches has been fully developed in the federal courts. It is unmistakable from all the case law that the doctrine becomes operative only when asserted as a defense, see e.g. *United States v. Koreh*, 59 F.3d 431, 445 (3<sup>rd</sup> Cir, 1995), *Amernational Industries, Inc. v. Action-Tunggram, Inc.* 925 F.2d 970, 978 (6<sup>th</sup> Cir., 1991), *Costello*, supra, *In Re Levy*, supra 256 B.R. at 566, *Stone v. Williams*, 873 F.2d 620, 622 (2<sup>nd</sup> Cir., 1989), and R. 8(c), F.R.C.P., supra. Here, no the non-moving party did not invoke the doctrine in any of its pleadings.

The Opinion, inexplicably invoking the doctrine of laches *sua sponte*, proceeds to briefly recapitulate the elements of the doctrine, allude to the delay in bringing the Motion as the basis for one element and then simply abandons the element of prejudice altogether. Abandoning the element of prejudice, the Opinion fails altogether to bring the doctrine to bear to the case at bar. “The test of laches is prejudice to the other party.” *Gutierrez*, supra, 373 U.S. at 215, the establishment of which is the burden of the non-moving party, *EEOC v. The Great Atlantic & Pacific Tea Company* 735 F.2d 69, 80 (3<sup>rd</sup> Cir., 1984). Every case in which the doctrine was considered carefully considered the prejudice to the non-moving party, as established by the party asserting laches as a defense. In *Stone*, supra, the changed positions of the defendants in reliance upon the plaintiff’s failure to assert her claims, was deemed prejudicial, as well as the loss of evidence and memory resulting from her extended delay, 873 F.2d at 625, see also *In the*

*Matter of Whitney-Forbes, Inc.* 770 F.2d 692, 698 (7<sup>th</sup> Cir., 1985). The court in *Robin Island, supra*, when it applied the doctrine of laches to close off the plaintiff's title claim observed:

“It is unlikely that SDC would purchased the property had it known its title was in dispute. SDC's plans . . . were premised on the assumption that chain of title was, for almost two hundred years, quiet and complete as recorded. Overturning a two hundred year old chain of title would result in a gross prejudice to SDC and the other successors-in-interest to the remainder Joseph Parker Wickham's confiscated estate,” 959 F. 2d at 424.

Here, by contrast, no such test was undertaken, or even addressed. Absent any analysis of prejudice to the non-moving party, there can be no application of the doctrine of laches, since it is prejudice that upon which the operation of the doctrine turns. Prejudice to the non-moving party could not be addressed in the Opinion because it was an impossibility: were the Motion to Vacate granted, the Debtor would gain a cause of action that it did not have before – the right to controvert the involuntary Ch. 7 bankruptcy. A party cannot be prejudiced by gaining a right that it did not previously enjoy, since prejudice is necessarily defined as the impairment of the non-moving party's rights in litigation, see, *e.g., Gutierrez, supra, Gardner, supra, EEOC, supra.*

In conclusion, the Opinion here appealed attempted to invoke the doctrine of laches when it was never pled by the non-moving party and no prejudice to the non-moving party was demonstrated of record. Since the test of laches is prejudice, and the Motion to Vacate would give the non-moving party more not fewer rights were it granted, the Opinion's failure to address this prejudice could hardly have been inadvertent, for the conclusion that it would have been forced to draw would be that no prejudice could be found.

-II-

**THE BANKRUPTCY COURT ERRED IN ITS DENIAL OF APPELLANT'S MOTION TO VACATE PURSUANT TO RULE 60(b)(6) WHEN THE APPELLANT DEMONSTRATED IN THE MOTION THAT THE AGREED ORDER OF JUNE 11, 2002, BY WHICH THE CHAPTER 7 PROCEEDING WAS CONVERTED TO A CHAPTER 11 PROCEEDING, WAS PROCURED BY FRAUD EXTRINSIC TO THE JUDGMENT.**

By resting its result on the doctrine of laches, the Opinion abjures any factual analysis of the Motion's essential fraud claims. The Opinion only states categorically that "Malooof failed to offer any evidence showing fraud" and that "Having determined herein that Malooof's motion fails on other grounds, the Court need not address the requirements of Rule 7009 further," Opinion at 8. By means of these devices, the Opinion evades any analysis of the facts presented by the Appellant. By evasion of the requirement under R. 52(a), F.R.C.P., to make findings of fact, the Opinion can rest its conclusions on the claim that "Malooof provides no meaningful new evidence to support his claims" Opinion at 5.

-A-

**The Bank Group Through its Counsel Committed Fraud Upon the Court When It (1) Fraudulently Induced Appellant to Stipulate to the Agreed Order Converting the Chapter 7 to a Chapter 11 Proceeding and (2) Fraudulently Represented to the Court that the Case Would be Administered "in a Manner that Will Preserve and Protect the Businesses and Assets of Debtors' Estates."**

The Motion asserted that the Bank Group through its counsel had committed fraud upon the court. Fraud on the court "is directed to the judicial machinery itself," *Bulloch v. United States* 763 F.2d 1115, 1121 (10<sup>th</sup> Cir, 1985), "conduct that corrupts the judicial process itself," *Dotson v. Bravo* 202 F.R.D. 559, 569 (USDC, ND Ill., ED, 2001),

"fraud which does or attempts to subvert the integrity of the court itself or a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner of its impartial task of adjudging cases that are presented for adjudication" *Lawlor v. Lomas & Nettleson Financial Corp. (In Re: Lawlor)* 50 B.R. 110, 115 (USBC, ND, TX, 1985)

or that “interferes with the court’s discharge of its judicial functions,” *Great Coastal Express v. IBTCWHA* 86 F.R.D. 131 (USDC, EDVa, 1980), see also *Martina Theatre Corp. v. Schine Chain Theatres, Inc.* 278 F.2d 798, 801 (2d. Cir., 1960), *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944), and *In Re Whitney-Forbes, Inc.*, *supra*, 770 F.2d at 698.

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 F.2d. 632, 643 (10<sup>th</sup> Cir., 1947), see also *United States v. Throckmorton* 98 U.S. 61, 67 (1878).

**-B-**

**The Signature of Appellant to the Agreed Order was Procured by Fraud in that He was Induced to Stipulate to the Order by Promises that the Bank Group had no Intention to Keep.**

Here, the Bank Group clearly acted with this purpose in procuring the signature of the Appellant to the Agreed Order. By means of their false promises, the Appellant was induced to go along with their continued control of the businesses, rather than challenge their rights to vote his shares to install Charles Sweet as Director and rather than challenging the involuntary Chapter 7 proceeding by means of a motion to controvert it. To the moment he signed the Agreed Order, he had both the right to contest Charles

Sweet as Director and to controvert the institution of the Chapter 7 proceedings. Both of these causes or defenses he gave up when he signed the Agreed Order. The fraud here argued does not go to the judgment itself, but to the manner in which it was procured and to the effect of that Order in preventing the Appellant from presenting his causes or defenses.

This Circuit is accord with the analysis set out in *Chisholm, supra*, when it considered the fraud claim in *Demjanjuk vs. Petrovsky*, 10 F.3d 338 (6<sup>th</sup> Cir, 1993). The *Demjanjuk* test has five elements, see at 10 F.3d 338 at 348. (i) The conduct must be by an officer of the Court. Here, the Agreed Order was offered to the Court by the Bank Group's attorneys. (ii) The conduct must be directed to the judicial machinery itself. Here, the stipulations cut off the hearing for appointment of a Trustee and precluded a motion and hearing as to a conversion of the case, in which the Court would independently assess the facts bearing on such a conversion. (iii) The representation must be intentionally false, blind to the truth or is in reckless disregard for the truth. Here, the signature of the Movant, essential to the Agreed Order, *a fraud that was no less than a forgery*, was presented to the Court as an essential part of the Agreed Order. (iv) There is a positive averment, or is concealment when one is under a duty to disclose. Here, the Bank Group's attorneys vouched for the genuineness of the Movant's signature by presenting the Agreed Order to the Court, while concealing that it had procured the Movant's signature by deception. (v) The positive averment or concealment deceives the Court. Here, the Bank Group, through its attorneys, represented that the Agreed Order was the result of a voluntary accord and therefore operational and effective, when in fact it was void as the direct and proximate result of deceit. This fraudulent inducement of the

Appellant operated to procure the judgment converting the Chapter 7 to a Chapter 11 over which the Bank Group would have control as not only the dominant creditor but the as the party which voted in the sole director of the businesses – Level Propane Gases, Inc., Park Places, Inc., and their subsidiaries and affiliates – and hence full control over the businesses as Debtors in Possession.

This fraudulent Agreed Entry represented fraudulently to the Bankruptcy Court that by means of the conversion to Chapter 11, the case would be conducted “in a manner that will preserve and protect the businesses and assets of Debtors’ estates” (Stipulations at 7). As will be discussed at length below, at the time the Stipulation was brought into Court, the Bank Group had no intention of preserving or protecting the businesses or assets of the Debtors’ estates, but quite to the contrary, the Bank Group had the intention of stripping the businesses, particularly Level Propane Gases, Inc., of its assets and customer base. The Bank Group’s intention contrary to its representation to the Bankruptcy Court that it would act to “preserve and protect the businesses and assets of the Debtors’ estates’ was extrinsic to the judgment, as was the fraudulent manner in which the Appellant’s indispensable assent to the Agreed Order was procured. The Stipulation was an assurance to the Court, a stipulated proposed finding that operated to obstruct Appellant’s rights as shareholder and disputed director of the very sort that was the basis for vacating the judgments in *Chisholm, supra* and *Demjanjuk, supra*. Far from an erroneous legal contention “out in the open,” *Oxford Clothes XX, Inc. v. Expeditors International of Washington, D.C.* 127 F.3d 574, 577 (7<sup>th</sup> Cir., 1997) that was subject testing in open court, the deceit practiced by the officers of the court acting on behalf of the Bank Group frustrated the very adjudication process itself with false promises to the

Appellant to gain his assent to a Conversion Order that deliberately misrepresented to the Court that this Chapter 11 proceeding would be conducted “in a manner that will preserve and protect the businesses and assets of Debtors’ estates.”

The Opinion relies on laches in its attempt to evade addressing the evidence that cannot be avoided: that four specific promises were made to the Appellant, Maloof, promises incorporated into the Conversion Order itself, and each of which was broken. Each of these promises was made on June 11, 2002 and relied upon when the Appellant, Maloof, signed the agreement that day. Each of these promises was broken. Contrary to the Opinion’s claim that “he has failed to allege with any degree of particularity fraud in the inducement of the Settlement Agreement,” Opinion at 8, the Appellant identified four particular promises that were made to induce him to agree to the Conversion Order, discussed below, and has brought forth evidence that each of these promises, made part of the Conversion Order, was broken. That the Opinion bore little relation to the record is further born out by its statement that: “Maloof has not alleged or presented evidence supporting any relationship whatsoever between the alleged fraudulent statements and the Bank Group entering the Agreed Order,” Opinion at 8. This statement is simply incomprehensible when the entire pleading turns on the misconduct of the Bank Group. Far from being victims of empty promises made to induce them to enter the Agreed Order, the Bank Group, through its counsel at the negotiations of the Agreed Order of June 11, 2002, made the empty promises to induce the Appellant to sign the Agreed Order. The Agreed Order contained as an essential finding, advanced by the Bank Group by means of the Agreed Order, that the case would be conducted “in a manner that will

preserve and protect the businesses and assets of Debtors' estates" (Stipulations at 7).

This finding was a fraud upon the Court.

The Appellant's unknowing stipulation to this fraud was induced by four promises that the Bank Group had no intention of keeping, which promises it promptly broke. These promises were 1) That the Debtors would not engage Benesch, Friedlander, Coplan & Aronoff as permanent counsel for the Debtors; 2) That the Debtors would engage DSI as the Debtors' active financial advisors; 3) That Newmarket Partners, hired by the Bank Group as their on-site representative at the Debtors' place of business would not participate in any management decisions of the Debtors and 4) That the Appellant would be provided weekly financial reports of the businesses. Each of these promises was broken.

The Appellant's stipulation was essential to the Agreed Order, otherwise he, as the sole shareholder of the corporate Debtors, had the legal right to challenge the election of Charles Sweet as the director of the corporations and to seek to controvert the involuntary Chapter 7 proceedings. As pled in the Motion to Vacate and discussed below, the course of conduct pursued by the Bank Group demonstrated clearly and convincingly that they had every intention, not of protecting the going concerns, but of destroying the businesses of the Debtors and stripping them of their assets.

In order to excuse its failure to address the fraud that led to the Agreed Order, the Opinion, after stating the particularity requirement of R. 9(b), F.R.C.P., claims "it need not address the requirements of R. 7009 further" because "Maloof's motion fails on other grounds," Opinion at 8. Had the Opinion addressed the particular allegations of the Motion to Vacate, it would have to have acknowledged that the fraud alleged was pled

with particularity as required by R. 9(b), F.R.C.P. The particularity required by R. 9 (b) is satisfied by a pleading that states who, what, when, where, and why the fraud was advanced, *Melder v. UCARGO, Inc.* 27 F.3d 1097, 1100 (5<sup>th</sup> Cir., 1994), *DiLeo v. Ernst & Young* 901 F.2d 624, 627 (7<sup>th</sup> Cir., 1990), *Williams v. WMX, Inc.* 112 F.3d 175, 178 (5<sup>th</sup> Cir., 1997). The Motion to Vacate plead with particularity not only the specific promises that were made to induce Appellant to join the Conversion Order that expressly represented that the case would be conducted “in a manner that will preserve and protect the businesses and assets of Debtors’ estates,” but the conduct, all of which of officers of the court, that deliberately contrary to that positive averment.

-C-

**The Bank Group Continued to Commit Fraud Upon the Court by Means of the Undisputed Acts of Destruction of the Businesses of the Debtor’s Estate by Debtor’s Officers Which Were Installed by the Bank Group and Were Themselves Officers of the Court.**

That the assurances of the Bank Group to preserve the assets of the estate were utterly false, and false at the time they were made, is born out by the pre-petition and post-petition conduct of the management installed by the Bank Group. In Paragraph 21 of the Motion to Vacate, it is alleged and sworn that Patty Geitgey, part of the management installed at the insistence of the Bank Group, directed that no more than 25 loads of propane be purchased from the pipeline per week, contrary to the need to build allocation in anticipation of the heating-season supply short-fall. During the heating-season supply short-fall, the Debtor lacked the allocation it required to fill the orders that customers were piling on as winter temperatures plunged, Paragraph 33, Motion to Vacate. Simultaneously with the short-fall, created by the Bank Group’s pre-petition determination that pipeline allocation was unnecessary to build for the heating season,

Debtor's management, officers of the court, directed that the partial-fill practice be abandoned, so that significant numbers of customers went without heating fuel for days on end, Paragraph 33, Motion to Vacate. No one can dispute that a fuel supply enterprise must be able to deliver fuel to its customers in order to retain its enterprise value. The Bank Group, by its pre-petition conduct while in control of the Debtor, and its post-petition conduct through the officers it installed acted to destroy the enterprise value of the Debtor. The course followed by the Bank Group's installed management was so contrary to the survival of the enterprise that it precludes simple poor judgment. The course followed by management post-petition was all outside of the authorization of the Court.

This unauthorized conduct, so much of it as the Movant is aware, consisted of the following: wholesale destruction of the corporate records of the Debtor (Paragraph 28, 29, 30), wholesale destruction of the customer records of the Debtor (Paragraphs 1 and 2, Supplemental Post-Hearing Document Submission, Exhibits "B" and "C"), unauthorized sale of customer tanks during the 2002-2003 heating season (Paragraph 31), the painting of the over one hundred 30,000-gallon plant tanks "Amerigas White" in April, 2003 (Paragraph 31), the pursuit of practices that left the Debtor's system out-of-gas and numerous customers unsupplied during a record cold-snap (Paragraph 33) that followed from the decision of the Bank Group to severely limit summer pipeline purchases that created the out-of-gas crisis (Paragraph 22). This conduct of officers of the Court was so contrary to the preservation of the estate's assets as to preclude mistake or poor judgment, and was so concerted a campaign as to preclude mere co-incidence. That this

course was followed and that it was the will of the Bank Group was undisputed by the Debtor's Opposition to the Motion to Vacate.

Conduct of this kind by officers of a debtor-in-possession has been condemned as fraud on the court that will be cause to vacate an order of sale, *Gumport v. China Investment Trust and Investment Corporation (In Re Intermagnetics America, Inc.)* 926 F.2d 912 (9<sup>th</sup> Cir., 1991), or revoke a confirmation of a Chapter 11 Plan of Reorganization, *First-Union Nat'l Bank v. Tenn-Fla Partners (In re Tenn-Fla Partners)*, 170 B.R. 946, (USBC, WD TN, 1994), because officers of a debtor-in-possession are officers of the court. As the Court deciding *Gumport, supra*, noted, "Officers of a debtor-in-possession are officers of the court because of their responsibility to act in the best interests of the estate as a whole and the accompanying fiduciary duties," 926 F.2d at 917. In both these cases, the officers of the Debtor acted to pillage the Debtor, and in both cases the Order by which they were able to accomplish the pillage was vacated as a result of fraud upon the Court. Here, in like manner, the mover in this case, the Bank Group, set the stage for the pillage of the Debtor and saw to its pillage through the officers that it selected and installed in the bankruptcy case.

It cannot be disputed that the Bank Group represented to the Court that the Chapter 11 conversion would assure the administration of the estate "in a manner that will preserve and protect the businesses and assets of Debtors' estates, prevent any further losses thereto, and maximize the value of the Debtors as going concerns for the benefit of their estates and creditors" (Stipulations at Paragraph 7). The course of the Bank Group's pre-petition and post-petition conduct through its pre-petition management control and the officers it installed to manage the Debtor post-petition makes it clear that

its representation that the affairs of the Debtor would be managed “in a manner that will preserve and protect the businesses and assets of Debtors’ estates” was a bold, knowing and deliberate falsehood, foisted first upon Movant and then upon the Court.

The inducement of the Movant by means of its false promises was a necessary step to convert the case to a Chapter 11 by which it accomplished this fraud upon the court. The false promises to abide by the conditions of the Movant, conditions upon the Movant insisted in order that the power of the Bank Group be checked by the means available to him as the shareholder, were merely a means to its end. It achieved its end through a course of conduct that destroyed the enterprise, or going-concern, value of the businesses of the Debtors. This is no less an offense than the secret sale of Intermagnetics to CITIC in *Gumport, supra* by its CEO Anand, or the frauds of the Officers of Tenn-Fla Partnership in *First Union, supra*, in both of which cases the challenged Orders were vacated. Here the course of conduct pursued by the Bank Group is presented by undisputed evidence. That evidence demonstrates a scheme every bit as offensive to the operation of the Court as *Gumport, supra* and *First Union, supra*.

In conclusion, the Motion to Vacate plead with particularity fraud upon the court committed by the Bank Group. The Bank Group first committed fraud upon the court by its false stipulation, made by and through its counsel, that it would preserve and protect the businesses and assets of the debtors’ estate. It then compounded this fraud by conduct that wrecked the businesses and stripped the assets of the debtors’ estate, by means of the officers it installed, and, as officers of the debtors in possession were officers of the court. The averred statement of the facts, which remains factually unchallenged, plead with a

particularity demanded by R. 9(b), that fraud upon the court was committed, and that this fraud was an ongoing, knowing plan. None of this did the Opinion here appealed address.

### CONCLUSION

For the reasons set forth above, that in denying Appellant's Motion to Vacate pursuant to R. 60(b)(6), F.R.C.P., the Bankruptcy Court erred (1) in its application of the doctrine of laches when it was neither pled nor proven by the non-moving party and there was no determination that the non-moving party was prejudiced by any lapse of time and (2) in its determination that there had been no fraud upon the Court when undisputed evidence demonstrated with particularity that (a) officers of Court fraudulently represented that the case would be administered "in a manner that will preserve and protect the businesses and assets of Debtors' estates," (b) Appellant had been induced by fraud to enter into the Agreed Order by means of false promises made to him by officers of the Court, (and (c) officers of the Court acted deliberately to destroy the businesses of the Debtors' estates and strip the Debtors' estates of their assets. For all of these reasons Appellant urges this Court to reverse the order denying his Motion to Vacate the Agreed Order of June 11, 2002.

Respectfully Submitted,

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SERVICE

I hereby certify that on this 2<sup>nd</sup> day of February 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