

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

In Re:	)	Case No. 07-CV-03623-AA
	)	
LEVEL PROPANE GASES, INC., et. al.	)	
	)	Bankruptcy Case No. 02-16172
Debtors.	)	
_____	)	
	)	JUDGE ANN ALDRICH
WILLIAM H. MALOOF,	)	
	)	
Appellant,	)	MAGISTRATE JUDGE PERELMAN
	)	
vs.	)	
	)	
JOHN VERBOS,	)	
	)	
Appellee	)	

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

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**APPELLANT'S CORRECTED BRIEF**

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## STATEMENT OF THE CASE

This case, *In Re: Level Propane Gases, Inc., et al.*, Case No. 02-16172, 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. By Order of the Bankruptcy Court pursuant to agreement, the going concern assets of Level Propane Gases, Inc. were conveyed to Horizon Propane, LLC on June 27, 2003. On June 6, 2006, Appellant filed a Motion to Vacate the Agreed Conversion Order. This Motion was denied by the Bankruptcy Court on December 7, 2006, and this Court affirmed the Bankruptcy Court on August 16, 2007. On September 5, 2007, Appellant filed a Motion to Vacate the Agreed Conversion Order and the Agreed Sale Order pursuant to R. 60(b)(6), F.R.C.P. (Docket Item No. 3140, as amended October 11, 2007, Docket Item No. 3165) In contrast to the Motion of June 6, 2006, the Motion to Vacate filed September 5, 2007 presented statements of nine (9) separate witnesses either under oath or under penalty of perjury and extensive documentary evidence.

Further, the present Motion to Vacate (Docket Item No. 3140, as amended, Docket Item No. 3165) it articulated four specific courses of fraudulent conduct, each of which was supported by the evidence submitted with the Motion to Vacate. The first course of fraudulent conduct was the pre-petition seizure of control of the companies by the Bank Group and the frustration of the attempt to sell the home-heat portion of Level Propane (Motion to Vacate Ex. 1, 2, 4.) The second course of conduct was document concealment, disposal and destruction, necessary in order to leave no means of testing the accuracy of the customer database (Motion to Vacate Ex. 6, 7, 8, 17, 19, 20, 22, 23.) The third course of conduct was the manipulation of the tank count and the customer count in the databases, in order to misrepresent the customer base of Level

Propane so that the delivery of the going concern assets to the designated party, Horizon Propane, as a sharply and dishonestly undervalued entity, would be credible to the Court (Motion to Vacate Ex. 9, 17, 18, 20, 21, 24) in conjunction with the frustration of the April, 2003 auction of the going concern (Motion to Vacate Ex. 25, 26.) The fourth course of conduct was the waylaying of customer payment checks to Level Propane before its going concern assets were sold, and their subsequent negotiation after the going concern assets were sold by parties affiliated with the entity that purchased the going-concern assets (Motion to Vacate Ex. 10, 11, 12, 13.)

The hearing of this Motion to Vacate was set for October 16, 2007. Having requested an evidentiary hearing, Appellant served subpoenas on certain witnesses to appear at the hearing, among whom was John Verbos. Mr. Verbos moved to quash his subpoena, relying on a claim that *H.K. Porter Co. v. Goodyear Tire & Rubber Co.* 563 F.2d 1115 (6<sup>th</sup> Cir., 1976) precluded his subpoena because it held that only upon the showing of a “prima facie case” could discovery process issue, John Verbos Motion to Quash Subpoena (Docket Item No. 3163.) Appellant opposed his Motion to Quash, specifically addressing the claimed holding of *H.K. Porter, supra*, (Docket Item No. 3166), to which Movant replied (Docket Item 3170.) The Motion to Quash was heard on October 16, 2007, and was granted from the bench. The Bankruptcy Court did not hear the Motion to Vacate, reserving ruling on the evidentiary hearing to a later time. The Bankruptcy Court issued a written Order on October 23, 2007 (Docket Item No. 3180.) A Notice of Appeal was timely filed on October 28, 2007 (Docket Item No. 3183.)

### **STATEMENT OF THE ISSUE**

1.) Whether the Bankruptcy Court committed clear error when it granted John Verbos' Motion to Quash premised on an erroneous statement of the law in *H.K. Porter Co. v. Goodyear Tire & Rubber Co.* 563 F.2d 1115 (6<sup>th</sup> Cir., 1976).

### **ASSIGNMENT OF ERROR**

1.) The Bankruptcy Court committed clear error when it granted John Verbos' Motion to Quash premised on an erroneous statement of the law in *H.K. Porter Co. v. Goodyear Tire & Rubber Co.* 563 F.2d 1115 (6<sup>th</sup> Cir., 1976).

## LAW AND ARGUMENT

### Introductory Statement

This appeal arises from a subpoena directed to John Verbos to testify with respect to Appellant's Motion to Vacate the Agreed Conversion Order of June 11, 2002 and the Agreed Sale Order of June 27, 2003 in the Chapter 11 proceeding captioned In Re: Level Propane Gases, Inc., et al., Case No. 02-16172 (Docket Item No. 3140, as amended 3165.) The Bankruptcy Court granted Mr. Verbos' Motion to Quash his subpoena (Docket Item No. 3163), and relied on counsel for Mr. Verbos to draft the Order (Docket Item No. 3180), which reads in relevant part:

"This motion essentially is premised on the grounds of fraud on the court, which is governed by Fed. R. Civ. P. 60(b)(3). This Court relies upon *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976) and holds that Mr. Maloof must make a prima facie showing of fraud on the Court prior to being entitled to discovery. The Court concludes that Mr. Maloof has not made a prima facie showing of fraud upon the Court. Accordingly, Mr. Maloof's subpoenas to the movants subjects the movants to undue burden and expense," Order, at 2, emphasis supplied.

As demonstrated below, the Motion to Vacate was brought pursuant to R. 60(b)(6), and the language upon which the Order relied was in no respect the holding of *H.K. Porter, supra*. Appellant will demonstrate that the holding of *H.K. Porter, supra*, was misrepresented in the Motion to Quash and that misrepresentation was carried into the Court's Order. This misrepresentation and its application to the Motion to Quash, by which the outcome of the Motion to Vacate was all but decided, is characteristic of the behavior of those that have used the Bankruptcy Court in the Level Propane Proceedings as an instrument to achieve their own invidious ends, ends so at odds with the statutory role of the Bankruptcy Court that the Bankruptcy Court itself might well be said to have been turned into an instrument of the Bank Group's fraudulent scheme.

## ASSIGNMENT OF ERROR No. 1

### **The Bankruptcy Court Committed Clear Error in Applying the Language from *H.K. Porter Company v. Goodyear Tire & Rubber, Inc.* 563 F. 2d 1115 (6<sup>th</sup> Cir., 1976) that Referenced a “Prima Facie” Case as Law to Grant John Verbos’ Motion to Quash Subpoena to Appear to Testify Regarding Appellant’s Motion to Vacate Agreed Conversion Order and Agreed Sale Order.**

In these Chapter 11 proceedings, the Bank Group, and those who had cast their lot with the Bank Group, sacrificed the Bankruptcy Court’s integrity, to transform the Bankruptcy Court into an instrument of the Bank Group’s specific fraudulent ends: the decimation of Level Propane’s apparent going-concern value during the 2002-2003 heating season and the direction of that going-concern to Horizon Propane, LLC, as a straw man for Amerigas, LP, in June, 2003.<sup>1</sup>

The Bankruptcy Court’s role is hardly to be envied – it is burdened with the tension between efficient administration of consensual financial adjustments among large groups of contending parties and the actual decision of controversies between debtors and creditors when there is no consensus to be had. The Bank Group corrupted this process by its domination of Level Propane and the other companies it dragged into bankruptcy from the moment that it filed its petition for involuntary bankruptcy. This was a corruption of the Bankruptcy Court every bit as outrageous as that in *Root Refining Co. v. Universal Oil Products Co.* 169 F.2d 514 (3d Cir., 1948). Unlike the Circuit Judge, Judge Davis, in *Root Refining Co., supra*, however, who

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1.) The Bankruptcy Court’s historical readiness in these proceedings to give credence to the good intentions of the Bank Group despite evidence to the contrary and its resistance to Appellant’s efforts to demonstrate the Bank Group’s invidious conduct is nonetheless disturbing. and is demonstrated by the following incidents: First, in March, 2003, Appellant, without counsel, requested an Emergency Hearing respecting the Appointment of an Examiner (Docket Item No. 1150.) As if he were an attorney, he was given one hour to marshal his witnesses, one of whom was Mr. Verbos, to testify regarding the shredding of documents at the Level Propane headquarters. By contrast, when he sought to subpoena Patrick Tighe and Anthony Pressly to the hearing to Reopen the Examiner’s Investigation (Docket Item No. 2887) in April, 2006, the Bankruptcy Court, making pointed note that he was not an attorney, specifically refused to allow him to examine Mr. Tighe in Court, insisting that his evidence by taken by deposition . As it turned out, the Court never considered either Mr. Tighe’s nor Mr. Pressly’s testimony, which were conducted by BFCA with Appellant present, despite the fact transcripts of both the damning depositions were filed with the Bankruptcy Court.

willingly gave up his Court's integrity to corporate hooligans bent on protecting a monopoly patent, in order to save his brother's orange groves from tax foreclosure, or to wrench himself from the oppressions of hostile and unrelenting creditors, the Bankruptcy Court in this case did not willingly give up its integrity. Rather, this Bankruptcy Court was victimized by the Bank Group, who was determined to exploit the Court's collaborative and consensual processes of debt adjustment to reduce the Court to its private instrument by which it decimated the apparent value Level Propane in order to direct Level Propane's going concern to its chosen party, Horizon Propane, LLC, while creating the pretext that the going concern, the value of which had been hidden by the fraudulent conduct of, among others Robert Angart and Richard Anter, was all but worthless.

**-a-**

**The Party Moving to Quash Knowingly Misrepresented the Holding of *H.K. Porter Company v. Goodyear Tire & Rubber, Inc.* 563 F. 2d 1115 (6<sup>th</sup> Cir., 1976) to the Bankruptcy Court.**

In this Motion to Quash, (Docket Item No. 3163) counsel for Mr. Verbos deliberately misdirected the Court to the language of p.1118 in *H. K. Porter, supra*:

“Goodyear *contends* that the District Court erred in holding that it was required to make a prima facie showing of fraud in order to be entitled to discovery after judgment,” 563 F.2d at 1118, emphasis supplied.

Appellant, resisting the Motion to Quash, marshaled the statements of Suzanne Arena and Jeff Kessler in support of his showing of fraud upon the Bankruptcy Court (Docket Item No. 3166). Counsel for Mr. Verbos dismissed both statements as “bare allegations” that failed to make out a “prima facie” case in support of the Motion to Vacate (Docket Item No. 3170).

Counsel for Mr. Verbos certainly read the above-quoted passage in *H.K. Porter, supra*, 563 F.2d at 1118, and certainly knew full-well that this passage in no way was the holding of the case. Counsel for Mr. Verbos has thus acted true to form by those allied to the Bank Group: just

as Brian Salvagni, whose accomplished criminal connivances described in *United States v.*

*Triana* 468 F.3d 308 (6<sup>th</sup> Cir., 2006) displayed elsewhere<sup>2</sup> the skills which he deployed to deflect the Examiner's attention from the massive document destruction that characterized the Bank Group's management of Level Propane (see Motion to Vacate, Ex. 6, Salvagni Interview, Docket Item No. 1630, Exhibit B11, p. 74), so counsel for Mr. Verbos misdirected the Bankruptcy Court

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2.) In June, 2003, Brian Salvagni testified before the Examiner at length regarding the disposal of corporate documents in March, 2003. Upon completing this testimony, while still under oath, he was asked "Is there anything else about the document destruction issue or any other issue that you think the examiner should be aware?" To this question, Mr. Salvagni replied at length concerning the conduct of Benesch, Friedlander, Coplan & Aronoff's between June 4, 2002 and June 6, 2002, concluding that the conduct "clearly created a significant problem for the company." (Salvagni Statement to Examiner Docket Item No. 1630, June 2, 2003 at 78, 1.19-79 1.7.) Almost three years later, Patrick Tighe testified that he had observed massive document disposal in December, 2002. He further testified that he had informed Mr. Salvagni immediately upon so observing it. (Tighe Deposition, March 29, 2006, Docket Item No.2960, at 14.11 5-15, Motion to Vacate, Ex. 6.) Clearly, Mr. Salvagni knew of the December, 2002 document disposal, but held his silence concerning it. Since so testifying in 2006, Mr. Tighe has been unable to reach Mr. Salvagni, with whom he had maintained a casual, but regular, business relationship as an insurance broker and safety consultant. He brought this circumstance recently to the attention of Mr. Maloof, in an effort to ascertain whether Mr. Salvagni might be avoiding him for any reason.

When Suzanne Arena informed the Appellant several days later that Mr. Salvagni's spouse had threatened divorce over an "illicit legal deal" in which he was said to have received "a million dollars" but abandoned the threat once she became pregnant, the Appellant attempted to find out what that "illicit deal" might have been. A search of Mr. Salvagni's name on the Google.com search engine revealed a most extraordinary coincidence: that Mr. Salvagni was named as an un-indicted co-conspirator in *United States v. Triana* 468 F.3d 308 (6<sup>th</sup> Cir., 2006.) More extraordinary, the conduct in which he was involved, Medicare fraud, occurred in 1998 through 2004, simultaneously with and subsequent to Mr. Salvagni's employment at Level Propane Gases, Inc.

Dr. Triana, a podiatrist, had been previously convicted of Medicare fraud, and as a condition of probation, he was not to bill Medicare or participate as a principal in any Medicare provider in any manner.

"Nonetheless, *with the help of Salvagni, his corporate attorney and friend*, Triana was able to create two new companies, Footcare and Podiatry Admin., and use them in a scheme that would enable him to participate, benefit from, and control a podiatry practice that billed Medicare." *Triana, supra*, at 311, emphasis supplied.

Mr. "Salvagni stated that though he helped to create Footcare and Podiatry Admin., he informed Triana that to comply with the law" *Triana, supra*, at 317. Nevertheless,

"At trial, Peck testified that both *Triana and Salvagni* had assured her that after signing the appropriate paperwork, she would be "relieved of all responsibilities" regarding Podiatry Admin., including ever having to visit the company headquarters in Ohio. In return for permitting Triana to use her name, Peck received a \$500 monthly stipend from the Podiatry Admin. account" at 312.

Mr. Salvagni's role in the *Triana* conspiracy makes an uneasy parallel to his role at Level Propane Gases, Inc. during its dismemberment in the Bankruptcy Court. Not only was he actively present in both, but Ms. Peck's coerced role parallels that of Leah Foster, who observed that "Mr. Salvagni was not forthcoming about the documents," and that Mr. Angart's office "had been cleaned out," but could not speak up because, she, like Ms. Peck, was in straightened financial circumstances (Motion to Vacate, Ex. 23.) While Ms. Peck needed the money, Ms. Foster needed to keep her job as the paralegal at Level Propane. Whatever Mr. Salvagni's role in the cover-up at Level Propane, that he had a role speaks emphatically to the cover-up's existence, especially when he complained to Patrick Tighe, who advised Mr. Salvagni of the December, 2002, document destruction, that "everyone was making a fortune off this bankruptcy but me."

to language in a reported case that cannot form the basis for determination of either the Motion to Quash or the Motion to Vacate to which the Motion to Quash relates. In so doing, counsel deliberately led the Bankruptcy Court to clear error, *In re Brown* 342 F.3d 620, 633 (6<sup>th</sup> Cir., 2003.), see also *Schenck v. City of Hudson* 114 F.3d 590 (6<sup>th</sup> Cir., 1997) as an instance in which the application of erroneous law resulted in reversal respecting an attempt to enjoin enforcement of a zoning ordinance designed to slow the growth of a municipality, at 594-595.

The holding of *H.K. Porter, supra*, with respect to R.60(b), is found not on p. 1118, but rather on the following page:

“Thus it is only necessary for this Court to review the evidence presented in the motion hearing to determine whether the District Court abused its discretion in holding that no evidentiary basis was shown warranting further discovery. Goodyear complains that it was held to a standard of proving a prima facie case [emphasis supplied] of fraud in order to obtain discovery. While the Court suggested such a test, the Court did not have to apply such a test because it found that Goodyear had shown *no* proof of fraud; thus under any evidential burden Goodyear would not be entitled to discovery,” 563 F.2d at 1119.

This Circuit never determined that a prima facie case was required in order to allow post-judgment discovery: it required only that the party seeking such discovery make some showing beyond “none” that further discovery was warranted. In this case, there has been an abundant showing, which demonstrates four courses of fraudulent conduct, by the Exhibits to the Motion to Vacate.<sup>3</sup> Statements made under penalty of perjury that describe events with specificity cannot in good faith be dismissed as “bare allegations” in any Court.

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(Footnote 2, con’t.) While it might be said that his participation in the Triana Medicare fraud indicates lack of mistake on his part in a conspiracy at Level Propane, see R. 404(b), Fed. R. Evid., more vitally, his prior conduct with respect to Dr. Triana is indeed a telltale that a conspiracy existed to destroy Level Propane as a going concern from March, 2002 to the Bank Group’s ultimate success in June, 2003, when all its going-concern assets were sold, and it was stripped of any capacity to do any business whatsoever. Indeed, had Mr. Salvagni addressed the December, 2002, document destruction, he would have pointed to a pattern, instead of away from it, he would have spoken to the cover-up, instead of away from it, and the Examiner, fortified with the knowledge of a continuing cover-up, would have had to have reached a different conclusion than that he “discovered no evidence that any documents were improperly shredded or discarded by the Debtors,” Examiner’s Report at 104, Docket Item No. 1616, USBC, NDO Case No. 02-16172.

It is simply astonishing that the Motion to Vacate supported by testimony of no less than nine (9) separate individuals, under oath or penalty of perjury (see Motion to Vacate, Exhibits 1, 3, 6,7, 9, 10, 17, 19, 20, 22, 23, 24, 27) is dismissed by counsel for the Appellee as composed of “bare allegations.” It is further astonishing that the Motion to Vacate was assessed without so much as a hearing by Order quashing the Verbos subpoena.<sup>4</sup> The Bank Group has managed to so dominate these proceedings that even such misstatements of law and fact, of which this is a patent instance, to protect its intolerable position are embraced.

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3.) See the Transcript of the October 16, 2007 hearing of the Motion to Quash, at pp. 8-9, in which the Court ruled on the Verbos subpoena from the bench on the basis of the mischaracterized holding of *H. K. Porter, supra*, and at pp.17-19, in which the issue of the evidentiary hearing was touched upon, never reaching the merits of the Motion to Vacate.

4.) As stated above, the first course of fraudulent conduct was the pre-petition seizure of control of the companies by the Bank Group and the frustration of the attempt to sell the home-heat portion of Level Propane (Motion to Vacate Ex. 1, 2, 4.) The second course of conduct was document concealment, disposal and destruction, necessary in order to leave no means of testing the accuracy of the customer database (Motion to Vacate Ex. 6, 7, 8, 17, 19, 20, 22, 23.) The third course of conduct was the manipulation of the tank count and the customer count in the databases, in order to misrepresent the customer base of Level Propane so that the delivery of the going concern assets to the designated party, Horizon Propane, as a sharply and dishonestly undervalued entity, would be credible to the Court (Motion to Vacate Ex. 9, 17, 18, 20, 21, 24) in conjunction with the frustration of the April, 2003 auction of the going concern (Motion to Vacate Ex. 25, 26.) The fourth course of conduct was the waylaying of customer payment checks to Level Propane before its going concern assets were sold, and their subsequent negotiation after the going concern assets were sold by parties affiliated with the entity that purchased the going-concern assets (Motion to Vacate Ex. 10, 11, 12, 13.)

Appellant has made clear, in the chart concerning the Officers of the Court, that each of the Officers of the Court was integrally involved in one or more of these courses of fraudulent conduct. Appellant has identified the following parties as officers of the court under *In Re Intermagnetics*, 926 F.2d 912 (9<sup>th</sup> Cir., 1991): (a) BFCA as a firm and John Gleeson and H. Jeffrey Schwartz as lead attorneys in the Level Propane Gases, Inc. bankruptcy proceedings (Motion to Vacate Ex. 4); (b) Jeff Marwill as counsel for the Bank Group in the bankruptcy proceedings (Motion to Vacate Ex. 4, 21); (c) Steven Sues as CEO of the purported Debtors in Possession (Motion Ex. 21, 25, 26); (d) Richard Anter as the President of Level Propane Gases, Inc. (Motion to Vacate Ex. 8, 11, 12); (e) Robert Angart, CFO of the purported Debtors in Possession (Motion to Vacate Ex. 6, 19, 23); (f) Brian Salvagni, General Counsel for Level Propane (Motion Ex. 6, Examiner Report Exhibit B11, In Re Level Propane Gases, Inc. Case No. 02-16172 Docket Item No. 1630) ; (g) John Verbos, as President and CIO of Level Propane Gases, Inc. (Motion to Vacate Ex. 9, 10, 17, 24) ; (h) Paul Lowe, COO of Level Propane Gases, Inc. (Motion to Vacate Ex. 19); and (i) Natasha Brandt, Bankruptcy Coordinator for the purported Debtors in Possession and an attorney at law (Motion to Vacate Ex. 8, 10.)

The evidence also makes clear that the Officers of the Court acted in concert to advance the invidious ends of the Bank Group: in the instance of particular relevance to the issues here, Richard Anter waylaid the customer payment checks (Motion to Vacate Ex. 11, 12) that John Verbos delivered for deposit after the going concern was stripped from Level Propane (Motion to Vacate Ex. 10.)

-b-

**Appellant has Shown Fraud Upon the Bankruptcy Court.**

This Court has ruled in *Maloof v. Level Propane Gases, Inc.*, 07-0153, U.S.D.C., N.D.O., Docket 19, that a Motion to Vacate was to be tested by its *evidence*, and that, since a District Court sitting as an appellate court cannot take new evidence, and as a trial court is not required to withdraw the reference of a particular matter under 11 U.S.C. Sec. 157, so is not required to take new evidence, the Bankruptcy Court is the proper forum to present newly discovered evidence in support of a subsequent Motion to Vacate these Orders. The Appellant has not come to Court to relitigate the same evidence supporting the same theory as in his June, 2006, Motion to Vacate, but to consider new and all but conclusive evidence that has given rise to a new theory, see *Ferrell v. Trailmobile* 223 F.2d 697, 698 (5<sup>th</sup> Cir., 1955), in which the court observes that all but conclusive evidence, regardless of delay in its presentation to court, can vacate a prior judgment.

The holding in *H. K. Porter, supra*, cannot be severed from its facts: the Defendant, Goodyear, sought to vacate the Judgment holding that the patents of the Plaintiff, H.K. Porter Co., Inc., had been infringed by Goodyear. Goodyear challenged the judgment on the basis that certain documents it claimed were within the ambit of its pre-trial discovery requests had been withheld in bad faith by the Plaintiff, H. K. Porter, and that “Porter’s attorneys knew of and sponsored these misdeeds,” 563 F.2d at 1118-1119, thereby constituting fraud upon the Court under R. 60(b)(6). The Court held:

“A Rule 60(b) motion is addressed to the sound discretion of the Court. *Jacobs v. DeShetler*, 465 F.2d 840, 843 (6th Cir. 1972). Likewise, the scope of discovery is within the discretion of the trial judge. *Chemical & Indus. Corp. v. Druffel*, 301 F.2d 126, 129 (6th Cir. 1962). When *two parties have opposed each other in a protracted lawsuit tried to judgment*, and the losing party's motion for relief under Rule 60(b) does not indicate to the Judge who presided at the trial that his Court has been victimized by the fraud of the winning party, it is well within his discretion to require the moving party to make a showing in support of its allegations before

requiring the prevailing party to submit a second time to extensive discovery to protect his judgment,” 563 F.2d at 1119, emphasis supplied.

The proposition for which *H. K. Porter, supra*, stands is that the regulation of discovery relating to a R. 60(b) motion is committed to the sound discretion of the trial court, no less than other matters before it. Thus, it was within the trial court’s discretion to call upon Goodyear, the losing party to a litigation that had been tried at length to judgment, and twice previously appealed, to show some evidentiary support for its allegations that the pre-trial discovery irregularities amounted to fraud on the court as a condition for further post-judgment discovery. In *H.K. Porter, supra*, Goodyear had none, as our Sixth Circuit held:

While the Court suggested such a test, the Court did not have to apply such a test because it found that Goodyear had shown *no* proof of fraud; thus under any evidential burden Goodyear would not be entitled to discovery, 563 F.2d at 1119.

The contrast between the case at bar and *H. K. Porter, supra*, could not be sharper: neither the Agreed Conversion Order nor the Sale Order was the result of “protracted litigation” that included extensive pre-trial discovery. Neither Order were the result of discovery or trial, but arose only from the representations made by officers of the Court and upon which the Court justifiably relied. The very process upon which the Bankruptcy Court must rely, the negotiation of consensual orders to adjust debt, was here simply hijacked by the Bank Group to direct the going concern to Horizon Propane as the straw man for Amerigas. The Agreed Conversion Order was not subject to any objections, and the Sale Order subject only to limited objections concerning which no testimony was taken. Neither of these Orders were the result of any litigation beyond the formal hearings required to reduce the agreements they memorialized to judgment. The proceedings related to both the Agreed Conversion Order and the Sale Order, sharply contrast to the “litigation to judgment” and evidentiary hearing that preceded the trial court’s Order in *H.K. Porter, supra*.

There is no allegation here of a corrupted trial, as in *H. K. Porter, supra*, because as to neither order was a trial had. Instead, these Orders arose as the Court's ratification of agreements between the purported Debtors and other parties, primarily the Bank Group and its allies, to the Chapter 11 proceedings. These frauds upon the Court were carried into court by officers of the Court, among which were BFCA, Jeffrey Marwill, Steven Sues, and Mr. Verbos himself, to advance the scheme that placed the going concern in the hands of Horizon Propane as the straw man for Amerigas. In the first instance, the Conversion Order (Motion to Vacate, Ex. 4), officers of the court, including BFCA and Jeff Marwill, represented to the Court that the conversion's purpose was to preserve and protect the businesses, when in fact, its purpose was to continue their control of the companies they pulled into involuntary bankruptcy rather than give the control over to an independent Chapter 7 Trustee. In the second instance, the Sale Order, the frauds carried into Court were that (1) Level Propane had fallen into hopeless default, when in fact millions in cash customer payment were hidden (Motion to Vacate, Ex. 10, 11 and 12), that (2) there had been a true auction when competing bids had been deliberately frustrated (Star Gas emails, Motion to Vacate, Ex. 25 and 26) and that (3) the customer count had been deliberately misstated and the means to verify the customer count either taken off-premises or destroyed (see e.g. Motion to Vacate, Ex. 7, 8, 21 and 22), which could only have been accomplished with the Bank Group's continued domination and control.

The Conversion Order was thus the means by which the Bank Group could maintain complete control over Level Propane so that it could direct the going concern to Horizon Propane in the guise of a sale. Horizon Propane promptly conveyed the going concern to Amerigas, indeed, on October 3, 2003, perhaps as quickly as the transaction documents could be drafted.

This fraudulent conduct described above is entirely unlike the pre-trial discovery dispute that Goodyear attempted to bootstrap into fraudulent concealment by the prevailing Plaintiff in *H.K. Porter, supra*. The conduct here parallels that out-of-court conduct found to constitute fraud on the Court in *In Re Levander*, 180 F.3d 1114, 1120, (9<sup>th</sup> Cir. 1999), when an officer of a Debtor in Possession that its assets had not been sold when in fact all its assets had been conveyed to a partnership controlled by its principles months before. In finding fraud on the court, it observed that “neither the Levanders *nor the court* had any reason to question the Corporation with respect to whether the Corporation still possessed its assets,” at 1120, emphasis supplied. Exactly the same circumstance obtains here: by means of their conduct, the participants in this matter created a fraudulent history so that the Court had no reason to question the direction of Level Propane’s going-concern assets to Horizon Propane as Amerigas’ straw man. As in *Levander, supra*, the Court took first the Conversion Order and then the Sale Order at face value, having no means and no reason to question either of them. The Appellant, in like manner, had not the means, that is to say the facts at hand, to question either of the Orders.

Similarly, in *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9<sup>th</sup> Cir., 1998), following the holding in *In Re: Intermagnetics* 926 F.2d 912 (9<sup>th</sup> Cir., 1991) fraud on the court was found as a result of conduct occurring outside of court. This case concerned a wrongful death claim resulting from product defects, in which the plaintiff’s decedent was killed by the discharge of a gun due to failure of the gun’s safeties when he dropped it. The Defendant’s vice-president and general counsel concealed a video recording of a drop-test of the gun during which test the safeties failed, disclosing to the Plaintiff and *to the court* only the video recording in which the gun safeties worked in the drop-test. Because he was counsel for the Defendant, had framed the Defendant’s discovery responses, and held both the video recordings of the gun’s

drop test, he was ruled an officer of the court despite the fact that he had not entered a notice of appearance in the litigation, nor was admitted to the court in which the trial took place, *Pumphrey, supra*, 62 F.3d at 1131-1132. The same manner of fraudulent concealment described and condemned in *Demjanjuk vs. Petrovsky*, 10 F.3d 338 (6<sup>th</sup> Cir, 1993),<sup>5</sup> by which the entire judicial process has been turned on it's head by the concealments of the officers of the Bankruptcy Court. This manner of fraudulent concealment was perpetrated as an out-of-court fraud by officers of the court as in *In Re: Intermagnetics* 926 F.2d 912 (9<sup>th</sup> Cir., 1991), in which the secret sale of the Debtor Corporation to the Chinese government, concerning which its CEO lied to the Court in order to obtain the going concern at a fraction of its value fatally infected the sale judgment. Exactly the same sort of fraud infected *In Re Tri-Cran, Inc.* 98 B.R. 609 (U.S.B.C., D. Mass., 1989), in which the purchaser of the business colluded with officers of the Court to obtain the business for a fraction of its true ascertained value and he and the officers of the court with whom he colluded before the Bankruptcy Court to conceal their out-of-court collusion .

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5.) Our Sixth Circuit has ruled in *Demjanjuk, supra*, that  
“the elements of fraud upon the court as consisting of conduct:

1. On the part of an officer of the court;
2. That is directed to the “judicial machinery” itself;
3. That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;
5. That deceives the court,” 10 F.3d at 348,

in accord with *Pumphrey, supra*, when it found that the concealment by Department of Justice lawyers of the first interview with Otto Horn, in which he failed to choose Demjanjuk’s photograph from a photo-array, was fraud upon the Court, because this concealment interfered with the Court’s ability assess the issue of Demjanjuk’s identity as “Ivan the Terrible:”

“What neither Judge Battisti nor Demjanjuk's counsel knew was that the contemporaneous reports of the 1979 Horn interview by the OSI investigator and historian directly conflicted with Horn's testimony at the deposition that when he finally identified Demjanjuk's photograph in the second spread he could not see the first set of pictures. Yet, the reports both stated that Horn was unable to identify Demjanjuk's photo in the first spread and only did so while examining the second spread and noticing the resemblance between the Demjanjuk photo in that set and the Demjanjuk photo in the first spread, which was lying face-up where Horn could see it as he examined the second set.” *Demjanjuk, supra*, 10 F.3d at 351, emphasis supplied.

In a manner analogous to that in *Pumphrey, supra, Intermagnetics, supra, Demjanjuk, supra and Tri-Cran, supra*, the Conversion Order was not to preserve the business, but to secure the complete domination and control of the Bank Group over the business, and the Sale Order was not to transfer the going concern assets to an arm's length buyer, but to direct the going-concern to Horizon Propane, LLC, acting as straw man for Amerigas, LP. The entire conduct of the bankruptcy – from the shredding, through the concealment of company's customer records, sabotage of the company's databases, to the bonfire of a thousand banker boxes of customer tank leases in April, 2003, and the waylaying of tens of thousands of customer checks – was the fraudulent means by which the Sale Order consideration in an arm's-length sale might be made plausible, when the conveyance was little more than an outright gift, rather than the direction of the Level Propane's going-concern assets to Horizon Propane, LLC for its straw-man conveyance to Amerigas, LP. In that way, the Bankruptcy Court was made the instrument of the Bank Group. In the words of the *Pumphrey* decision: whatever diligence the moving party exercised, “the district court was empowered to set aside the verdict, *as the court itself was the victim of the fraud,*” 62 F.3d at 1133, emphasis supplied.

Thus, the decision in *H. K. Porter, supra*, let alone the erroneous statement of its law requiring a prima facie case, has no bearing on the case at hand, because the evidence presented with the Motion demonstrate the fraud alleged, as in *Levanter, supra, Pumphrey, supra, Intermagnetics, supra*, and *Demjanjuk, supra*. As in *Levanter, supra*, in *Pumphrey, supra*, in *Intermagnetics, supra*, and in *Demjanjuk, supra*, out-of-court fraudulent conduct is fraud upon the court the moment it is carried into court. Both of the challenged Orders resulted from such out-of-court fraud carried into court by which the Orders themselves became instruments of fraud. The pre-petition history of the Bank Group's domination of Level Propane since the

March 7, 2002 Forbearance Agreement (Motion to Vacate, Ex. 2) demonstrates its intention to continue its domination in the bankruptcy, which domination it accomplished by means of that agreement. The post-petition conduct, in which the company's written and database records were either concealed or fatally compromised, was the fraud with which the Sale Order was infected, and was the fraud deliberately shielded by the Agreed Conversion Order, no less than the phony patents in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 206 (1944) and *Root Refining, supra*. As a result, both Agreed Conversion Order and the Agreed Sale Order were not only the direct products of fraud upon the Bankruptcy Court but are themselves instruments of fraud.

### **Conclusion**

For the reasons set forth above, that the Bankruptcy Court committed clear error in holding that the subpoena directed to John Verbos should be quashed pursuant to the erroneous statement of the law in *H.K. Porter Company v. Goodyear Tire & Rubber, Inc.* 563 F. 2d 1115 (6<sup>th</sup> Cir., 1976) by which it held that Appellant was required to show and had not shown a prima facie case in support of his R. 60(b)(6) Motion to Vacate. The Bankruptcy Court went beyond an erroneous application of the law, to apply language that was not in any respect a holding in *H.K. Porter, supra*, as if it were the holding that governed this issue. Appellant urges this Court to reverse the Order appealed and for such other relief as is within its jurisdiction to grant.

Respectfully Submitted,

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**SERVICE**

I hereby certify that on this 5<sup>th</sup> day of December, 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