

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: 02-16172
: (Jointly Administered)
Debtors. :

: Judge: ANN ALDRICH
WILLIAM H. MALOOF, :
: Magistrate Judge: PERELMAN
Appellant, :
: :
-vs- :
: :
LEVEL PROPANE GASES, INC., *et al.*, :
: :
Appellees. :

APPELLEES’ OBJECTION TO (A) APPELLANT’S MOTION TO WITHDRAW THE REFERENCE WITH RESPECT TO APPELLANT’S CIVIL RULE 60(B)(2) MOTION TO VACATE THE BANKRUPTCY COURT’S ORDER PRESENTLY PENDING ON APPEAL BEFORE THIS COURT AND (B) APPELLANT’S CIVIL RULE 60(b)(2) MOTION TO VACATE THE BANKRUPTCY COURT ORDER PRESENTLY ON APPEAL BEFORE THIS COURT

Level Propane Gases, Inc. (“Level”) and its affiliated debtors and debtors in possession (collectively, the “Debtors” or “Appellees”) in those cases under chapter 11 of Title 11 (the “Bankruptcy Code”) of the United States Code presently pending before the United States Bankruptcy Court for the Northern District of Ohio and being jointly administered under Bankruptcy Case No. 02-1617, hereby object (the “Objection”) to *Appellant’s Motions for Evidentiary Hearing, to Vacate the Order of the Bankruptcy Court Subject to this Appeal Pursuant to R. 60(b)(2), F.R.Civ.P., and to Withdraw the Reference Pursuant to 28 U.S.C. Sec. 157(d)* (the “Motions”) and for the reasons set forth below assert that (a) the motion to withdraw the reference should be denied and William H. Maloof (“Maloof” or the “Appellant”) should be

directed to file his Civil Rule 60(b)(2) motion seeking to vacate the decision presently on appeal to this Court in the Bankruptcy Court, and (b) if this Court determines it appropriate to consider Appellant's Civil Rule 60(b)(2) motion, that such motion must be denied as Appellant has not and cannot satisfy all of the elements necessary to obtain relief thereunder. In further support of this Objection, Appellees state as follows:

INTRODUCTORY STATEMENT

These Motions are yet another in a series of unfounded and frivolous motions filed by Appellant seeking to revisit matters decided years ago by the Bankruptcy Court in the very early days of the Debtors' bankruptcy cases, specifically:

1. The *Motion of William H. Maloof to Reopen Examiner's Investigation and for the Appointment of a Substitute Examiner*, filed on January 31, 2006 and, following an evidentiary hearing, denied by the Bankruptcy Court in an order entered on June 27, 2006. Appellant did not seek reconsideration of or file a timely notice of appeal with respect to this order.
2. The *Motion Of William H. Maloof To Vacate The Agreed Order Converting Chapter 7 Proceedings To Chapter 11 Proceedings Entered Into On June 11, 2002 And Motion for Leave To Controvert The Involuntary Bankruptcy Petition Filed June 6, 2002* (the "Motion to Vacate"), seeking relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, filed on June 6, 2006 and, following a hearing thereon, denied by the Bankruptcy Court by order entered on November 28, 2006. The Bankruptcy Court's order denying the Motion to Vacate is the subject of this appeal.
3. The *Renewed and Restated Motion of William H. Maloof to Reopen Examiner's Investigation and for the Appointment of a Substitute Examiner* (the "Renewed and Restated Motion"), filed with the Bankruptcy Court on July 11, 2006 and, following a hearing thereon, denied by the Bankruptcy Court by order entered on November 28, 2006. The Bankruptcy Court's order denying the Renewed and Restated Motion is the subject of an appeal in Case No. 07-CV-0150, presently pending before this Court.
4. The *Motion of William H. Maloof to Disqualify Debtor's Counsel Pursuant to 11 U.S.C. § 327* (the "Disqualification Motion") filed with the Bankruptcy Court on November 14, 2006 and, after a hearing thereon, denied by the Bankruptcy Court by order entered on January 18, 2007. The order denying the Disqualification

Motion is the subject of an appeal pending before the Sixth Circuit's Bankruptcy Appellate Panel under No. 07-8007.¹

Each of the motions listed above has been denied by the Bankruptcy Court. Each such filing has, however, required the preparation of responsive pleadings, attendance at hearings and subsequent briefing, unnecessarily burdening the Debtors' estates with legal fees and related expenses. Thus, this is yet another instance where Appellant is engaging in repetitive and vexatious filings, abusing the procedural rules on the flimsiest of predicates, and multiplying these proceedings at the expense of the Debtor's estates.²

Here, Appellant is seeking, pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure (the "Civil Rules"), to vacate the Bankruptcy Court order denying Appellant's Civil Rule 60(b) motion to vacate an agreed order entered almost five years ago.³ An agreed order negotiated, agreed to and executed by the Appellant who, at all times during the course of the negotiations, was represented by competent and experienced bankruptcy counsel. As reflected in Appellant's statement of facts – a "review and analy[sis of] the evidence in hand to date"⁴ – the motion is premised on allegations that the Bank Group (defined below), the Debtors' senior secured prepetition creditors, together with Debtors' management, Debtors' counsel and others engaged in an ongoing scheme to destroy the Debtor[s] under the cover of the very Bankruptcy administration in which it was to be reorganized."⁵

¹ Most recently, on February 16, 2007, Appellant filed a Notice of Appeal with respect to the Bankruptcy Court's Opinion and Order, entered on September 23, 2002, authorizing the Debtors to retain Benesch, Friedlander, Coplan & Aronoff LLP ("Benesch") as their legal counsel in their chapter 11 cases.

² Not only have all of the motions listed above been denied by the Bankruptcy Court, the Bankruptcy Court has also awarded the Debtors sanctions under 28 U.S.C. § 1927 for Appellant's vexatious and multiplicative litigation tactics with respect to the Renewed and Restated Motion. The order granting Debtors' motion for sanctions is presently on appeal to this Court in Case No. 07-CV-0150.

³ Civil Rule 60 is made applicable in bankruptcy by Rule 9024 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

⁴ The Motions – p. 2.

⁵ The Motions – p. 18.

Appellant’s allegations against the Bank Group, the Debtors, Debtors’ management, Debtors’ counsel, Ray G. Warner (the “Examiner”), the examiner appointed in these cases on the request of the United States Trustee, and others are not new. Appellant made virtually identical claims in January 2004 in an action brought by BT Commercial Corporation in the United States District Court for the Northern District of Illinois, Case No. 03C8309, to enforce Appellant’s personal guaranty of the Debtors’ obligations to the Bank Group.⁶ (A copy of Appellant’s Answer and Counterclaim is attached hereto as Exhibit A). Additionally, in April 2004, Mr. Maloof filed a pleading in the Bankruptcy Court claiming that Debtors were destroyed by “the malfeasance and breach of fiduciary duties of U.S. Attorney Saul Eisen and his hand [sic] G. Ray Warner in collusion with attorneys and other officer of the court seeking to pillage the company of its assets” ⁷ (the “2004 Request for Inquiry,” copy attached as Exhibit B). In the 2004 Request for Inquiry, Appellant accused:

- The Bankruptcy Court of wrongfully denying him a 2004 examination and wrongfully deferring to the desires of the Bank Group, the Bank Group’s attorneys and a personal friend in deciding motions;⁸

⁶ The district court subsequently dismissed Appellant’s counterclaim and, on July 25, 2005 granted a monetary judgment in favor of BT Commercial Corporation in the amount of \$72,573,509.82 – which judgment was not appealed by Appellant. Notwithstanding this fact, on June 4, 2006, Appellant filed a civil suit in the United States District Court for the Northern District of Ohio, captioned *William H. Maloof, Individually And As Sole Shareholder Or Beneficial Owner Of Level Propane Gases, Inc. And Its Subsidiary Affiliates, Park Place, Inc. And Its Subsidiary Affiliates, and WHM Emprises, Inc. And Its Subsidiary Affiliates v. BT Commercial Corp. Individually And As Agent Of Deutsche Bank Trust Company Americas; Provident Bank; LaSalle National Bank Association*, docketed as Case No. 06-CV-01378, asserting a damage claims against the Bank Group for their alleged wrongful acts against the Debtors.

⁷ *Notice of William Maloof’s Sole Shareholder Request for Inquiry by the Honorable John Ashcroft, Attorney General of the United States of America, into Alleged Misconduct by the U.S. Trustee Saul Eisen, Examiner Warner and Other Officers of the Court* filed April 13, 2004, Docket No. 2349, at p. 1; and Affidavit of William H. Maloof dated April 13, 2004 attached in support of *Notice of William Maloof’s Sole Shareholder Request for Inquiry by the Honorable John Ashcroft, Attorney General of the United States of America, into Alleged Misconduct by the U.S. Trustee Saul Eisen, Examiner Warner and Other Officers of the Court* at ¶¶ 55, 60.

⁸ Affidavit of William H. Maloof dated April 13, 2004 attached in support to *Notice of William Maloof’s Sole Shareholder Request for Inquiry by the Honorable John Ashcroft Attorney General of the United States of America into Alleged Misconduct by the U.S. Trustee Saul Eisen, Examiner Warner and Other Officers of the Court* at ¶¶ 8, 27.

- Debtors’ counsel of destroying documents based on its financial instability, engaging in a pattern of disinformation and misrepresentation and of having misappropriated federally sponsored research from Case Western;⁹
- Debtors’ counsel, the Bank Group, Richard Jacobs, the Examiner and Greenberg & Taurig of conspiring to “destroy a new way of delivering propane ... because its cost-effectiveness threatened the NYSE companies, the law firms and banks viabilities.”¹⁰

Thus, Appellant’s dissatisfaction with the Examiner’s report and his allegations that the Bank Group improperly dominated the Debtors’ affairs and that the Debtors, Debtors’ counsel and/or the Bank Group engaged in a conspiracy to destroy the Debtors date back to more than two years before the filing of the Motion to Vacate. Appellant, however, took no steps at that time to obtain evidence supporting such claims despite the opportunities to do so afforded by, among other things, the Civil Rules in connection with the lawsuit pending in the United States District Court for the Northern District of Illinois.

Repeatedly, Appellant has attempted to justify his successive filings on the basis of some tiny increment of “newly discovered” evidence which purportedly supports Appellant’s theory of a Bank Group led conspiracy. With the exception of the original Motion to Reopen the Examiner’s Investigation filed on January 31, 2007, however, Appellant never sought an evidentiary hearing with respect to the Motions outlined above. Further, although Appellant contends that he was “foreclosed a forum in which to conduct either investigation or discovery,” Appellant has never sought to conduct discovery with respect to any of these contested matters as permitted under Bankruptcy Rule 9014.¹¹ Neither can any credence be given to Appellant’s

⁹ *Ibid* at ¶¶ 12,17, 40.

¹⁰ *Ibid* at ¶ 62.

¹¹ Bankruptcy Rule 9014 governing contested matters, i.e., matters commenced by motion, makes certain of the Civil Rules governing discovery applicable to contested matters. For example, Bankruptcy Rule 9014(c) provides, in pertinent part, that:

claim that his investigation was impeded by any restrictions on talking to Level employees contained in the Agreed Order. Such alleged constraints did not deter Mr. Maloof from conducting depositions of former Level employees such as Patty Sours, Jason DiMacchia and Aaron Rock in August and September of 2004.

Appellant's new Civil Rule 60(b) motion is premised primarily on evidence submitted to the Bankruptcy Court by the Appellant prior to that court's decision denying Appellant's Motion to Vacate:

This evidence is on the bankruptcy record in the Motion to Vacate, [Bankruptcy] Docket 2969, the Motion to Reopen the Examiner's Investigation, [Bankruptcy] Docket No. 2887, and the Renewed Motion to Reopen the Examiner's Investigation [Bankruptcy] Docket No. 981. Much of the evidence was placed on the record as it became known, and that evidence that was previously known, the statements and documents gathered by the Examiner and presented on June 6, 2003 was placed on the record once its relevance to the scheme was made apparent.¹²

None of this constitutes "newly discovered" evidence falling within the ambit of Civil Rule 60(b)(2). The only "newly discovered" evidence submitted in connection with Appellant's new Civil Rule 60(b)(2) Motion are (a) two brief statements of Jeff Kessler (one being only a single paragraph addressing the date of Mr. Kessler's first contact with Appellant) and (b) a short statement of Samantha Whitesel, both of whom appear to be former employees of Level,

Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed.R.Civ.P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) disclosures regarding expert testimony) and 26(a)(3) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony can proceed in the same manner as provided in Rule 7027 for taking a deposition before an adversary proceeding. The Court may at any stage in a particular matter direct that one or more of the other rules of Part VII shall apply.

FED.R.BANKR.P. 9014(c). Additionally, Bankruptcy Rule 9014(d) specifies that "Testimony of witnesses with respect to disputed factual issues shall be taken in the same manner as testimony in an adversary proceeding." FED.R.BANKR.P. 9014(D).

¹² The Motions – p. 2.

regarding alleged events that took place almost a year after the entry of the Agreed Order. Appellant does not present facts demonstrating why these statements could not, with due diligence, have been discovered prior to the hearing on the Motion to Vacate or the deadline for moving for a new trial set by Civil Rule 59(b). Neither does Appellant demonstrate how the statements of Mr. Kessler and Ms. Whitesel, regarding events that occurred well after the entry of the Agreed Order, are material to demonstrate fraud on the Bankruptcy Court with respect to the entry of the Agreed Order or are of such magnitude that their production would have been likely to change the Bankruptcy Court's disposition of the Motion to Vacate.

Finally, notwithstanding the fact that Appellant elected to have this court serve in an appellate capacity to review the propriety of the Bankruptcy Court's order denying the Motion to Vacate, Appellant now seeks to have this Court withdraw the reference from the Bankruptcy Court to take evidence and rule on Appellant's new Civil Rule 60(b) motion. The request for withdrawal of the reference is premised upon (a) allegations of Bankruptcy Court bias against Appellant evidenced by the adverse rulings made against Appellant by the Bankruptcy Court justifying a discretionary withdrawal and (b) allegations that federal anti-trust laws are implicated warranting a mandatory withdrawal. These allegations are without merit, constitute nothing more than "forum shopping" and should be rejected by this Court.

FACTUAL AND PROCEDURAL BACKGROUND

This contested matter arises in the chapter 11 cases of Level and its affiliated debtors and debtors in possession, which cases were commenced on June 6, 2002 (the "Petition Date") when BT Commercial, Deutsche Bank Trust Company Americas, LaSalle Bank National Association and the Provident Bank (collectively, the Bank Group"), the Debtors' senior secured creditors, filed involuntary petitions for relief under chapter 7 of the Bankruptcy Code (the "Involuntary

Petitions”) against each of Park Place Management, Inc., The Park Place Companies, Inc., Park Place, Inc., Over-Flo Lot, Inc., Level, Level Energy Group, Inc. and WHM Emprises, Inc.

Concurrent with the filing of the Involuntary Petitions, the Petitioning Creditors also filed an *Emergency Motion for Appointment of Interim Trustee and Related Relief*, in Level’s case, seeking the immediate appointment of a trustee with the sole and exclusive authority to operate Level’s business free from the interference of Mr. Maloof, as necessary to preserve the property and prevent further loss to the Debtors’ estates on the grounds that Mr. Maloof, the principal of the Debtors, had breached his fiduciary duties to the Debtors and caused them significant and irreparable harm.

Subsequent to these filings, the Bank Group, the Debtors, Maloof and their respective counsel “entered into discussions to resolve the disputes that occasioned the replacement of the Debtors’ boards of directors and the filing of the Involuntary Petitions in a manner that will preserve and protect the business and assets of the Debtors’ estates, prevent any further loss thereto, and maximize the value of the Debtors as going concerns for the benefit of their estates and creditors.”¹³ At all times during such negotiations, Mr. Maloof was personally represented by his counsel, Richard A. Baumgart, a prominent, knowledgeable, local bankruptcy attorney with extensive experience in cases under chapter 7 and chapter 11 of the Bankruptcy Code.

On June 11, 2002, this Court entered an *Agreed Final Order and Stipulation*: (a) *Acknowledging the Authority of Charles Sweet as Sole Director of All Debtors*; (b) *Converting Cases to Voluntary Cases Under Chapter 11*; (c) *Granting Order for Relief Under Chapter 11*; (d) *Ordering Joint Administration of All Cases*; and (e) *Granting Other Relief* (the “Agreed Order”). The terms and provisions of the Agreed Order were agreed, acknowledged and

¹³ Agreed Order – p. 5, para. 7. (A copy of the Agreed Order is attached hereto as Exhibit C).

consented to by both Mr. Maloof and Mr. Baumgart, his personal counsel, both of whom were signatories to the Agreed Order.

The Agreed Order was supplemented on June 13, 2002 to clarify that orders for relief granted pursuant to the Agreed Order were to become effective as of June 17, 2002. On June 17, 2002, this Court entered its *Order Converting Cases to Cases Under Chapter 11 of the Bankruptcy Code*, pursuant to which the Chapter 7 Cases of the Original Debtors were converted to cases under chapter 11 of the Bankruptcy Code.

Subsequent thereto, under the supervision of the Bankruptcy Court and with the active involvement of numerous parties in interest, including Mr. Maloof, the official committee of unsecured creditors appointed by the office of the United States Trustee (the “Committee”), numerous equipment financiers, the Petitioning Creditors, the Equal Justice Foundation (class counsel in a class action lawsuit brought against Level on behalf of its customers in Ohio) and various state attorney generals, the Debtors’ propane distribution business was sold as a “going concern” on July 2, 2003, and their parking lot business was sold as a going concern on January 21, 2004. Every action taken by the Debtors outside of the ordinary course of their businesses – and many actions arguably in the ordinary course of the Debtors business but brought before the Court out of an excess of caution – were approved by the Bankruptcy Court after notice and a hearing.

On or about April 30, 2003, almost a year after the Petition Date, the Court, on motion of the United States Trustee, ordered the appointment of an examiner in these cases. Thereafter, G. Ray Warner was appointed to serve as examiner (the “Examiner”) by the United States Trustee. The Examiner was directed by this Court to investigate:

Allegations . . . which indicate that counsel for the jointly administered Debtors in these cases has misled the Court, the Office of the United States Trustee, and

parties in interest and have further failed to provide objective advice regarding the conduct of operations and management of the subject cases. More specifically, the U.S. Trustee asserts that allegations have been made that misconduct and nondisclosure by the Debtors' counsel have caused unspecified harm to the Debtors' estates and has prevented the Debtors from exercising their fiduciary obligations.

In furtherance of the aforesaid allegations and pursuant to provisions of §§ 1104(d) and 1196(b) of the Bankruptcy Code, the Examiner's investigation is to be inclusive of any fact pertaining to the aforementioned allegations, fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the Debtors, or to a cause of action available to the bankruptcy estates of the Debtors.

On June 6, 2003, the Examiner – after reviewing thousands of pages of documents and conducting 22 sworn and unsworn witness interviews – filed his report with the Court. A report which (a) found, among other things, “no definitive evidence that [Debtors' counsel] engaged in improper communications with the Lenders or their counsel prior to the filing of the involuntary chapter 7 cases or that [Debtors' counsel] had an arrangement, an advance understanding, or a unilateral design to advance the interest of the Lenders at the expense of their then clients,” and “no evidence that [Debtors' counsel] was controlled by the Lenders and/or their counsel.” and (b) concluded that “[Debtors' counsel] . . . competently represented the interests of the Debtors in these cases.”

On June 6, 2006, four years after the Petition Date and three years after the filing of the Examiner's Report, Appellant filed the *Motion Of William H. Maloof To Vacate The Agreed Order Converting Chapter 7 Proceedings To Chapter 11 Proceedings Entered Into On June 11, 2002 And Motion for Leave To Controvert The Involuntary Bankruptcy Petition Filed June 6, 2002* (the “Motion to Vacate”), seeking relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, made applicable in bankruptcy by Rule 9024 of the Federal Rules of Bankruptcy

Procedure. Appellant asserted therein that the Agreed Order was procured by fraud on the court.

Specifically, Appellant alleged that:

at least two parties, the Bank Group and the Debtors, as a class, had no present intention at the time the order was signed by them to “preserve and protect the businesses and assets of Debtors’ estates, prevent any further losses thereto . . . as going concerns for the benefit of their estates and creditors” and further their representation that the Chapter 7 Involuntary Bankruptcy Petition was filed in good faith. As a further basis to vacate the Agreed Order, the signature of your Movant was procured by fraud and coercion.

A hearing on the Motion to Vacate was held before the Bankruptcy Court on June 26, 2006. Subsequently, on November 28, 2006, the Bankruptcy Court issued a Memorandum of Opinion and Order denying the Motion to Vacate. Appellant filed a timely notice of appeal seeking review of the Bankruptcy Court’s denial of the Motion to Vacate. Appellant subsequently elected to have this appeal heard by this Court instead of the Sixth Circuit’s Bankruptcy Appellate Panel.

On March 20, 2007, Appellant filed the Motions asking this Court to withdraw the reference so that it may conduct an evidentiary hearing with respect to Appellant’s Civil Rule 60(b)(2) motion to vacate the Bankruptcy Court order denying the Motion to Vacate. Appellant supports the Motions with a lengthy “Statement of Facts” that purports to review and analyze the evidence in hand to date. Appellant utilizes this forum to assert, on yet another occasion, incredible allegations of a scheme or conspiracy (a) spanning more than a year’s duration, from before the filing of the Involuntary Petitions in June 2002 through to October 2003, four months after the Bankruptcy Court approved sale of Level and its propane distribution business to Horizon Propane LLC; (b) requiring the coordinated actions of the Bank Group, the Debtors’ postpetition management, Debtors’ counsel, the United States Trustee, the Bankruptcy Court, the court appointed Examiner, a prominent Cleveland businessman and others involved in the

Debtors' chapter 11 cases; and (c) taking place while all major actions in the Debtors' chapter 11 cases was subjected to the scrutiny of the Creditors' Committee, the equipment financiers and other parties in interest, when the Debtors' were required to file for public review monthly operating reports detailing their business operations, and when parties interested in acquiring the Debtors' propane distribution efforts were afforded two separate opportunities – one in August and September 2002, prior to the alleged acts of document destruction and asset concealment, and the other in May and June 2003 – to due diligence reviews of the Debtors' business operations.

Appellees' failure to challenge each of the factual assertions made by Appellant is not to be construed as an implied acknowledgement of the truthfulness or accuracy of the tale that has been concocted by Appellant. Appellees contend, to the contrary, that the credibility of Appellant's factual assertions must be measured by Appellant's failure to offer support for even those facts most crucial to sustaining the Appellant's allegations. For example, Appellant repeatedly asserts that Level's propane distribution business could have been sold to Star Gas for \$165 million or Ferrell Gas for \$150 million or Parthenon Capital for \$129 million, but he has never attached documents evidencing the existence or terms of these offers to any of his pleadings. Pleadings filed in the Illinois District Court litigation discloses that documents relating to these alleged offers were filed by Appellant in that litigation and that in each instance, these documents revealed that these alleged offers were nothing more than "non-binding" letters of interest subject to business, legal, accounting and financial due diligence.¹⁴ Further, what Appellant omits from the statement of facts is that in May 2002 – prior to the filing of the

¹⁴ Although the referenced exhibits are not available online, copies of *Defendant William H. Maloof's Response to Plaintiff's Undisputed Statement of Facts Pursuant to Local Rule 56.1(b)(3)(A)* and Plaintiff *BT Commercial Corporation's Reply in Support of its Statement of Undisputed Material Facts* are attached hereto as Exhibit D.

Involuntary Petitions, prior to the entry of the Agreed Order, almost a year before the alleged events of document spoliation and the alleged spiriting away of physical assets by the Bank Group and/or the Debtors' postpetition management – Parthenon Capital, *after completing its due diligence with respect to a possible purchase of the Debtors' propane distribution business*, reduced its offer from \$129 million to \$26 million.¹⁵

LAW AND ARGUMENT

A. APPELLANT HAS NOT DEMONSTRATED A BASIS FOR EITHER A DISCRETIONARY OR MANDATORY WITHDRAWAL OF THE REFERENCE WITH RESPECT TO HIS CIVIL RULE 60(b)(2) MOTION TO VACATE THE BANKRUPTCY COURT ORDER WHICH IS THE SUBJECT OF THIS APPEAL, THEREFORE, THE COURT MUST DENY APPELLANT'S REQUEST TO WITHDRAW THE REFERENCE AND REQUIRE APPELLANT TO SEEK THE RELIEF REQUESTED IN THE BANKRUPTCY COURT.

A Civil Rule 60(b) motion for relief from judgment should be filed in the court that rendered the judgment.¹⁶ Thus, Appellant's motion should have been filed in and should be heard by the Bankruptcy Court. In *First National Bank of Salem v. Hirsch*, the Sixth Circuit approved a procedure whereby the trial court may entertain a motion for relief from judgment filed during the pendency of an appeal. This procedure permits the trial court to entertain the motion for relief from judgment and, if inclined to grant the relief requested, enter an order so indicating at which time the party seeking the relief is to file a motion for remand in the appellate court.¹⁷ It should be noted, however, that Sixth Circuit has also held that although *Hirsch* allows "the court to entertain a motion for relief even while an appeal is pending, they do not require the

¹⁵ Examiner's Report, p. 68.

¹⁶ *Bankers Mortgage Co. v. U.S.*, 423 F.2d 73, 78 & n.9 (5th Cir. 1970); *United States v. Shaughnessy*, 175 F.2d 211, 212 (2nd Cir. 1949).

¹⁷ *First National Bank of Salem v. Hirsch*, 535 F.2d 343, 345-46 & n. 2 (6th Cir. 1976).

court to do so. *Once the defendants appealed, it was not erroneous for the [trial] court to let the appeal take its course.*"¹⁸

Appellant's acknowledgement of the need to file his motion in the Bankruptcy Court is implicit in his request that this Court withdraw the reference with respect to Appellant's new Civil Rule 60(b)(2) motion.¹⁹ Withdrawal of the reference, however, is not warranted in this instance. Section 157(d) of Title 28 of the United States Code provides:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.²⁰

Thus, as the statutory language indicates, withdrawal of the reference may be made on either a discretionary or mandatory basis. Here, Appellant argues that withdrawal of the reference is appropriate on both a discretionary and mandatory basis.

With respect to the argument that withdrawal of the reference is discretionary, Appellant asserts, in essence, that the Bankruptcy Court is biased against Appellant, implying that an adverse ruling is foreordained and a subsequent appeal inevitable:

Rather than seek a remand to the Bankruptcy Court, which has demonstrated a clear hostility to any suggestion that the conduct of this Bankruptcy administration was in any way less than the very model of probity, the remand here can be to the very court hearing the appeal, and capable of withdrawing the reference.²¹

Your Movant has . . . sought adjudication in the Bankruptcy Court and, having been refused there, without any consideration of his evidence, sought review of

¹⁸ *LSJ Investment Company, Inc. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (emphasis added).

¹⁹ Research uncovered only one unreported district court decision involving a request for withdrawal of the reference for purposes of considering a Civil Rule 62(b) motion subsequent to the perfection of an appeal, which request was denied, *225 West 4th Realty Corp v. Nisselson (In re 255 West 4th Realty Corp.)*, 1997 WL 154052 (S.D.N.Y. 1997) (A copy of this unreported decision is attached hereto).

²⁰ 28 U.S.C. § 158(d).

²¹ The Motions – p. 18.

the Bankruptcy Court's orders in this Court. In each and every instance where your Movant has sought redress in the Bankruptcy Court, in the Motion to Vacate in this appeal, in the Renewed Motion to Reopen Examiner's Investigation and in the Motion to Disqualify Debtors' Counsel, redress has been refused. In each instance he has appealed. Where he has sought to present new evidence to the Bankruptcy Court, as in his Renewed Motion to Reopen the Examiner's Investigation, redress has been refused. Any further attempt to seek redress of these outrages in the Bankruptcy Court, when that Court has made it clear that no evidence will move its fixed position, would be little more than a futile gesture.²²

Appellant made virtually the same argument previously in connection with a prior motion to withdraw the reference with respect to Appellant's Disqualification Motion. What this Court wrote in its order denying Appellant's prior request to withdraw the reference is equally relevant here:

No allegation is made that the instant motion is a non-core proceeding. . . . Nor does Maloof suggest that the bankruptcy court is somehow unable to rule on the instant motion, and must instead submit proposed findings of fact and conclusions of law for the district court to review de novo, pursuant to 28 U.S.C. § 157(c). On the contrary, Maloof's arguments assume that the bankruptcy court can and will "hear and determine" the instant motion pursuant to 28 U.S.C. § 157(b), and that the bankruptcy court's ruling would be appealed pursuant to 28 U.S.C. § 158. Therefore, the core character of the instant motion counsels against withdrawal of the reference. *See, e.g., In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993).

The Court must also consider whether withdrawal of the reference promotes efficient use of judicial resources, eliminates delay and costs to the parties, promotes uniform bankruptcy administration, and prevents forum shopping. *Id.* In other words, it is "congressional intent to have bankruptcy proceedings adjudicated in bankruptcy court unless rebutted by a contravening policy. *Holland v. LTV Steel Co.*, 228 B.R. 770, 7775 (N.D. Ohio 2002) (citations omitted). The only justification put forth by Maloof in that the bankruptcy judge is somehow unfit to rule on the instant motion, and that allowing the bankruptcy judge to rule would create the need for an otherwise unnecessary appeal, while this Court, by agreeing with Maloof, would eliminate the need for such an appeal.

Such "justification" is no more than "forum shopping", and counsels strongly against withdrawing the reference. Furthermore, as the motion is properly before the bankruptcy court which possesses greater familiarity with the parties, the underlying case, and the instant motion itself, this court finds that withdrawal would not promote efficient use of judicial resources or prevent delay or costs to the parties. Therefore, the court denies Maloof's motion to withdraw

22 (Motions – p. 22-23).

the reference. . . . If Maloof disagrees with the bankruptcy court's handling of this or any other matter, he may appeal such rulings pursuant to 28 U.S.C. § 158.²³

The same considerations are applicable here. Appellant does not contend that the Civil Rule 60(b)(2) motion is not a core matter or that the Bankruptcy Court lacks the authority to “hear and determine” the matter. Instead, Appellant argues that the Bankruptcy Court is likely to enter an adverse ruling necessitating an appeal. As this Court noted, such a justification is “no more than ‘forum shopping’ and counsels against withdrawing the reference.”

With respect to the argument that withdrawal of the reference is mandatory, Appellant asserts, in a single, short paragraph, that withdrawal of the reference in this matter is mandatory because the resolution thereof allegedly requires consideration of both bankruptcy and anti-trust statutes. The language of the second sentence of 28 U.S.C. § 157(d) requires the withdrawal of the reference only if “resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” Courts are admonished by the legislative history to construe this sentence narrowly. This admonition is reflected in the following colloquy during the House debate on the final version of section 157(d):

Mr. Kramer:

My question is this: The language “activities affecting interstate commerce” is very broad language. What kinds of situations or circumstances does the gentlemen intend to cover here? Or will this language become an escape hatch through which most bankruptcy matters will be removed to a district court?

Mr. Kastenmeier:

I thank the gentlemen for his question.

This language is to be construed narrowly. It would, for example, mean related cases which may require consideration of both title 11 and other Federal

²³ Order – p. 1-3, *In re Level Propane Gases, Inc.*, Case No. 1:06-MC-00119 (N.D. Ohio December 5, 2006) (Copy attached hereto as Exhibit E).

laws including cases involving the National Labor Relations Act, civil rights laws, Securities and Exchange Act of 1934, and similar laws.²⁴

During the Senate debate, Senator DeConcini similarly indicated that the second sentence of section 157(d) should be narrowly construed:

This provision concerns mandatory withdrawal of proceedings from the bankruptcy judge where the district court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. *The district court should only withdraw such proceedings if the court determines that the assertion that other laws regulating organizations or activities affecting interstate commerce are in fact likely to be considered, and should not allow a party to use this provision to require withdrawal where such laws are not material to resolution of the proceeding.*²⁵

Thus, this Court has previously held, in a seminal case on the construction of section 157(d), that:

Section 157(d) must therefore be read to require withdrawal not simply whenever non-Code federal statutes will be *considered* but rather only when such consideration is necessary for the *resolution* of a case or proceeding. The preceding analysis of legislative history and the Code's structure demonstrates the importance of the observations during the House debate that § 157(d) was not intended to become "an escape hatch through which most bankruptcy matters will be removed to the district court," and in the Senate debate that district courts "should not allow a party to use this provision to require withdrawal where such laws are not material to the resolution of the proceeding."²⁶

Consequently, to prevail on his mandatory withdrawal argument, Appellant must demonstrate to this Court that the antitrust statute he believes to be implicated will have to be considered by the Court and that such consideration is necessary to resolution of the matter before this Court. Appellant has not and cannot meet these requirements.

²⁴ 130 Cong. Rec. H1849-50 (daily ed. March 21, 1984) (emphasis added).

²⁵ 130 Cong. Rec. S6081 (daily ed. June 19, 1984) (emphasis added).

²⁶ *In re White Motor Corp.*, 42 B.R. 693, 703-704 (N.D. Ohio 1984) (emphasis in original). *Accord Pension Benefit Guaranty Corp. v. LTV Corp. (In re Chateaugay Corp.)*, 86 B.R. 33 (S.D.N.Y.), *rev'd on other grounds*, 496 U.S. 633 (1990); *Laborer's Pension Trust Fund – Detroit & Vicinity v. Kiefer (In re Kiefer)*, 276 B.R. 196 (E.D. Mich. 2002); *American Body Armor & Equip. Co. v. Clark (In re American Body Armor & Equip. Co.)*, 155 B.R. 588 (M.D. Fla. 1993); *Burger King Corp. v. B-K of Kansas, Inc.*, 64 B.R. 78 (D. Kan. 1986).

The specific issue that Appellant has placed before the Court by way of the Motions is whether the Bankruptcy Court's order denying the Motion to Vacate should be vacated pursuant to Civil Rule 60(b)(2). This issue requires the Court to determine whether Appellant has presented "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" that justifies relieving Appellant of the Bankruptcy Court's order denying the Motion to Vacate. Based on the Motions, this Court must determine whether the "newly discovered" evidence submitted by Appellant – the statements of Jeff Kessler and Samantha Whitesel regarding events that took place more than a year after the entry of the Agreed Order – constitutes newly discovered evidence that (a) could not, through due diligence, have been discovered prior to December 8, 2006, (b) is credible and material and (c) would probably have produced a new result on the issue of whether the Agreed Order was obtained by fraud on the court as alleged by Appellant in the Motion to Vacate. Federal antitrust laws are not even remotely implicated in this analysis. Thus consideration of antitrust laws is not "necessary to the resolution" of Appellant's Civil Rule 60(b)(2) motion. Accordingly, there is no basis for a mandatory withdrawal of the reference as requested in the Motions.

B. APPELLANT IS NOT ENTITLED TO RELIEF UNDER CIVIL RULE 60(b)(2) AS HE HAS NOT DEMONSTRATED AND CANNOT DEMONSTRATE THAT THE STATEMENTS OF MR. KESSLER AND MS. WHITESEL (A) COULD NOT, WITH DUE DILIGENCE, HAVE BEEN DISCOVERED PRIOR TO THE DEADLINE FOR A NEW TRIAL UNDER CIVIL RULE 59(E), (B) ARE MATERIAL AND (C) WOULD HAVE RESULTED IN A DIFFERENT RESULT THAN THAT REACHED BELOW WITH RESPECT TO THE MOTION TO VACATE.

The language of the rule provides that relief from a final judgment, order or proceeding may be granted on the basis of "newly discovered evidence which by due diligence could not

have been discovered in time to move for a new trial under Rule 59(b).”²⁷ Civil Rule 59(b) provides that “Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.”²⁸ In order to obtain a new trial on the basis of newly discovered evidence, Appellant must demonstrate all of the following elements:

1. The newly discovered evidence must have existed at the time of trial or must concern facts that were in existence at the time of trial;
2. The newly discovered evidence must have been discovered following the trial;
3. The moving party must have shown due diligence to discover the evidence;
4. The newly discovered evidence must be admissible;
5. The newly discovered evidence must be credible;
6. The newly discovered evidence must be material to the issues tried;
7. The newly discovered evidence must not be merely cumulative or impeachment evidence; and
8. The newly discovered evidence must be so significant that it is likely to change the outcome of the case.²⁹

The stringency of these requirements reflect the fact that relief under Civil Rule 60(b) is an extraordinary remedy.³⁰ One that requires the court to balance the tension between two goals: (1) that of ensuring that the court’s judgment reflects an appropriate adjudication of the rights and obligations of the parties, and (2) that of finally terminating the litigation in order to provide the parties with certainty as to the nature and extent of their rights and obligations as adjudication.³¹ Since Appellant does not and cannot satisfy each and everyone of these elements, he is not entitled to relief under Civil Rule 60(b)(2).

²⁷ FED.R.CIV.P. 60(b)(2).

²⁸ FED.R.CIV.P. 59(B). Since the Bankruptcy Court judgment denying Appellant’s Motion to Vacate was entered on November 28, 2006, the ten day deadline to seek a new trial specified in Civil Rule 59(b) would have expired on Friday, December 8, 2006.

²⁹ *United States v. McGaughey*, 977 F.2d 1067, 1075 (7th Cir. 1992) (proof of all elements is required and none may be excused even if newly discovered evidence is “dynamite” or “conclusive”).

³⁰ *Design Classics, Inc. v. Westphal (In re Design Classics, Inc.)*, 788 F.2d 1384, 1386 (8th Cir. 1986).

³¹ *In re Frigitemp Corp.*, 781 F.2d 324, 327 (2nd Cir. 1986); *Banker’s Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970) (“The provisions of [Rule 60(b)] must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of the court’s conscience that justice be done in light of all the facts”).

1. **Failure to Discover Evidence Earlier Must Not Be From Lack of Due Diligence.**

Diligence looks not to what Appellant actually discovered but what Appellant could have reasonably discovered or proffered at the time of trial or within time for a motion for a new trial. As noted by the leading treatise on Federal procedure:

[I]n order to prevail on a motion, the moving party must show that the failure to produce the evidence at trial or in time for a new trial was not caused by the moving party's lack of diligence. Diligence looks not to what the litigant actually discovered, but what he or she could have discovered.

The moving party may not simply *claim* that he or she has been diligent in obtaining evidence. The moving party must present *facts* that show why he or she was unable to present the evidence that provides the basis for the motion either in time for use at trial or in time for filing a motion for a new trial.³²

Thus, a movant “is obliged to show not only that this evidence was newly discovered . . . but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing.”³³ Thus, lack of diligence has been found in cases where the movant delayed or failed to use the opportunity to conduct discovery.³⁴ Neither is it enough for a movant to assert, without explanation, that he or she was unaware that certain evidence existed at all. Instead, the

³² 12 MOORE'S FEDERAL PRACTICE § 60.42[5] (Matthew Bender 3d ed. 2006).

³³ *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (citing *Englehard Indus., Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963); *United States v. Potamkin Cadillac Corp.*, 697 F.2d 491, 493 (2d Cir. 1983) (motion must set out facts as to how party sought out evidence – “Given the feebleness of [the movant's] proffer of ‘due diligence,’ . . . it was well within the district court's discretion to reject the explanations”); *Schwartz v. Capital Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993) (denial of Civil Rule 60(b) motion proper because “[t]here is no indication . . . [moving party] could not have discovered this evidence earlier”).

³⁴ *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006) (unexplained delay of more than four months in seeking to compel discovery shows lack of diligence); *MCI Telecommunications Corp. v. Matrix Communications Corp.*, 171 F.R.D. 7, 9 (D. Mass. 1997) (defendant did not use opportunity to conduct discovery concerning relationship between plaintiff and arbitration service, so “newly discovered” side agreement between plaintiff and arbitration service could not be basis for relief from order compelling arbitration).

movant must present concrete facts demonstrating why he or she was unaware that the evidence existed and concrete facts demonstrating why such ignorance was “excusable.”³⁵

Appellant argues that although he suspected “from the inception of the bankruptcy” that the dealings of Bank Group were far from honest,” that he was prevented from investigating by provisions of the Agreed Order barring him access to Level’s headquarters and employees and that in the absence of counsel he lacked the ability to effectively bring the alleged irregularities to the Bankruptcy Court’s attention. He asserts that “the first hint that the conduct of the Debtors’ management was concealed was in March 2003, leading to his emergency motion for the appointment of an examiner. Despite his dissatisfaction with the conclusions set forth in the Examiner’s report filed with the Bankruptcy Court and available for public review in June 2003, Appellant asserts that it wasn’t until more than two years later – in November 2005 – that a serendipitous remark by Patrick Tighe led Appellant to commence his inquiries for evidence in support of his theory of a Bank Group scheme “to seize and maintain control of Level Propane with invidious purpose.” Appellant alleges that access to post-petition email traffic of the debtor in possession – access apparently obtained prior to April 24, 2006, the date of the evidentiary hearing on Appellant’s Motion to Reopen – led to the statements of Suzanne Arena filed with the Bankruptcy Court on August 3, 2006 and August 4, 2006 respectively. Now, seven months later, Appellant offers his “newly discovered” evidence, i.e., the statements of Mr. Kessler and Ms. Whitesel.³⁶

Appellant’s feeble explanation, however, simply does not demonstrate that Appellant has acted diligently to uncover evidence supporting his allegations. As noted above, Appellant has

³⁵ *Rivera v. M/T Fossarina*, 840 F.2d 152, 156 (1st Cir. 1988) (citing *Brown v. Penn. RR Co.*, 282 F.2d 522, 526-527 (3d Cir. 1960) and *Goland v. CIA*, 607 F.2d 339, 371 n.12 (D.C. Cir. 1979) for the proposition that newly discovered evidence “normally refers to ‘evidence of fact in existence at time of trial of which the aggrieved party was excusably ignorant’”).

³⁶ The Motions – p. 11-13.

made virtually identical assertions of Bank Group misconduct since the beginning of 2004. As discussed above, such claims were made in January 2004 in Appellant's Answer and Counterclaim in the litigation commenced by the Bank Group in the Illinois District Court to enforce Appellant's personal guaranty of the Debtors' obligations to the Bank Group. Appellant also asserted such claims in the Request for Inquiry filed with the Bankruptcy Court in April 2004. Appellant does not, however, disclose any efforts made to uncover evidence relative to such claims during the pendency of the lawsuit or in connection with the Request for Inquiry.

Appellant alleges that his discovery of such evidence was impeded by lack of counsel. Appellant has, however, frequently been represented by counsel during the course of the Debtors' chapter 11 cases. Appellant was represented by counsel in the Illinois District Court action where he asserted similar allegations against the Bank Group. On February 20, 2004, Cleveland attorney Donald J. O'Connor entered a notice of appearance on Mr. Maloof's behalf.³⁷ On March 22, 2004, Mr. O'Connor was joined by Jonathan M. Cyruk, an attorney with the law firm of Stetler & Duffy, Ltd, a Chicago firm with an office located at 11 S. LaSalle Street, Chicago, Illinois.³⁸ Appellant has also been represented by several different attorneys in the Debtors' chapter 11 cases. He was represented by Richard Baumgart, an experienced bankruptcy attorney, at the time of the filing of the Involuntary Petitions and the entry of the Agreed Order (as reflected by Mr. Baumgart's signature thereon). On August 9, 2002, Cleveland bankruptcy attorney, Sebraien Haygood entered an appearance as counsel for Appellant. Mr. Haygood continued to serve as Appellant's counsel until entry of an order authorizing his

³⁷ A copy of this Notice of Appearance is attached hereto as Exhibit F;

³⁸ A copy of the document reflecting Mr. Cyruk's appearance on Appellant's behalf is attached hereto as Exhibit G.

withdrawal as counsel of record on November 20, 2002.³⁹ Subsequently, on June 10, 2003, Leo D. Plotkin and Mark D. Hurwitz of the Los Angeles, California law firm of Levy, Small & Lallas, entered an appearance in the bankruptcy court as counsel for Appellant, which engagement was apparently terminated by Appellant on July 31, 2003.⁴⁰ Most recently, since April 7, 2006, Appellant has been represented by his current counsel, David C. Eisler.⁴¹ Appellant clearly had the benefit of counsel for significant portions of the time during the pendency of the Debtors' chapter 11 cases, including specifically at the time of his first assertion of the allegations against the Bank Group. Thus, Appellant's contention that lack of counsel impeded diligence in obtaining evidence to support such allegations is without merit.

Appellant is similarly disingenuous when he asserts that he has been prevented from pursuing an investigation by the restrictions on contact with Level employees imposed under the terms of the Agreed Order. These restrictions did not prevent Appellant from conducting depositions of the following in the late summer and early fall of 2004: (a) Patricia Sours, former Level employee, deposed by Appellant on September 7, 2004; (b) Jason DiMacchia, former Level employee, deposed by Appellant on August 27, 2004; (c) Aaron Rock, former Level employee, deposed by Appellant on August 13, 2004; (d) Brian Salvagni, Level's former in-house counsel, deposed by Appellant on September 28, 2004; (e) Patty Geitgey of Newmarket Partners, deposed by Appellant on August 23, 2004; and (f) Patrick Tighe, outside safety director for Level, on September 17, 2004.

Contrary to Appellant's assertion that he "has been foreclosed a forum to conduct either investigation or discovery," Appellant neither sought an evidentiary hearing with respect to the

³⁹ A copy of Mr. Haygood's Notice of Appearance and a copy of the Bankruptcy Court order authorizing his withdrawal is attached hereto as Exhibit H.

⁴⁰ Copies of the Notice of Appearance by Messrs. Plotkin and Hurwitz and the subsequent Substitution of Attorney document filed by Mr. Maloof are attached hereto as Exhibit I.

⁴¹ A copy of Mr. Eisler's Notice of Appearance is attached hereto as Exhibit J.

Motion to Vacate nor did he seek to conduct any discovery with respect to the allegations asserted therein. Indeed, Appellant did not take advantage of the opportunity to conduct discovery provided under Bankruptcy Rule 9014 to conduct any discovery in connection with the Motion to Vacate or any other of his repetitive filings.

Neither has Appellant set forth concrete facts demonstrating why he was unable to present this “newly discovered” evidence prior to the hearing on the Motion to Vacate or the time for moving for a new trial under Civil Rule 59(b). Mr. Tighe’s comments were made in November 2005. Access to Level Propane’s internal emails apparently occurred prior to April 24, 2006, although Appellant does not indicate when or how he obtained such access. These emails allegedly led to Suzanne Arena on July 21, 2006. Now, seven months later, without any explanation for the delay or any facts that would demonstrate that such statements could not have been obtained prior to the Rule 59(e) deadline, Appellant produces the statements of Mr. Kessler – purported accounts receivable manager at the time Level was placed into bankruptcy thus someone whose existence should have been known by Appellant – and Ms. Whitesel.

Based on the foregoing – Appellant’s prior assertions of virtually identical claims against the Bank Group and others more than three years ago, Appellant’s failure to investigate such claims at the time of their assertion, Appellant’s failure to utilize any of the tools of discovery to substantiate such claims, Appellant’s failure to explain why the “newly discovered” evidence presented to this Court could not have been discovered prior to the hearing on the Motion to Vacate or prior to the deadline for moving for a new trial under Civil Rule 59(b); and Appellant’s failure to demonstrate that his ignorance of such evidence was “excusable” – Appellant cannot demonstrate due diligence or that the “newly discovered” evidence could not,

with reasonable due diligence, have been timely discovered and produced. Accordingly, Appellant's Civil Rule 60(b)(2) motion must be denied.

2. **The “Newly Discovered” Evidence Relates to Events that Allegedly Took Place Nearly a Year After the Entry of the Agreed Order and is Not Material to Issue of Whether the Bankruptcy Court’s Entry of the Agreed Order was Entered Through A Fraud On the Court.**

In addition to being unable to satisfy the due diligence element, Appellant cannot demonstrate that the “newly discovered” evidence submitted in connection with his Civil Rule 60(b)(2) motion is material to the issue of whether the Bankruptcy Court’s entry of the Agreed Order was obtained through a fraud on the Court.

Appellant made two arguments in his Motion to Vacate: (1) that his signature on the Agreed Order had been obtained by duress and (2) that he had been fraudulently induced to enter into the Agreed Order by (a) certain specific promises made therein and (b) the Bank Group’s alleged representation to the Bankruptcy Court that the Debtors’ cases would be conducted “in a manner that will preserve and protect the businesses and assets of Debtors’ estates.” As noted in prior filings in this appeal, a review of the Agreed Order indicates that the Bank Group made no such representation to the Court, indicating instead that Appellant had lifted such language from the factual stipulations of the Agreed Order and that such language was nothing more than the language used by the parties to the Agreed Order to describe the purpose of the negotiations entered into among Appellant, the Debtors and the Petitioning Creditors immediately after the filing of the Involuntary Petitions. Appellant’s argument that evidence of the alleged scheme is relevant to proving fraud on the court argument is, in short, wholly premised on an alleged breach – evidenced by the Bank Group’s alleged scheme to destroy the Debtors – of a nonexistent representation.

In denying the Motion to Vacate, the Bankruptcy Court, focusing as appropriate on the events surrounding the entry of the Agreed Order, concluded that Appellant had “failed to offer any evidence showing fraud, duress, or some other fact that is sufficient to void the Agreed Order, he has also failed to allege with any degree of particularity, fraud in the inducement of the [Agreed Order] or any other fact upon which the Agreed Order might be voided.”⁴² The statements of Ms. Whitesel and Mr. Kessler simply are not material to whether the Agreed Order entered in June 2002 was procured by fraud on the court.

The statements of Ms. Whitesel and Mr. Kessler describe events that allegedly occurred nearly a year after the entry of the Agreed Order. Further, their statements do not reference or connect in any way the Bank Group or any of its purported agents in the alleged scheme to the actions described therein. Consider Ms. Whitesel’s brief statement:

- Paragraph 6, the final paragraph thereof, merely relates the date on which Ms. Whitesel first met with Appellant.
- Paragraph 1 indicates that she wasn’t hired until after Level had been placed in bankruptcy, i.e., after the entry of the Agreed Order.
- Paragraphs 4 and 5 relate to and are cumulative of events described by Suzanne Arena, i.e., the alleged destruction of a hard copy customer account archive.⁴³
- Paragraph 3 stating that “in the first week of July 2003 she was assigned to assist in the cash room transferring customer account information from one computer data base into another data base,” lacks any meaningful detail permitting an assessment as to the specific purpose of such actions or their significance.
- Paragraph 2 stating that “in the first week of July 2003 she was assigned to assist in the cash room transferring customer payments to an Amerigas account prior to the acquisition of Horizon Propane,” is not only similarly lacking in detail to permit an assessment as to the significance or context of the alleged payment transfers, its reference to “prior to the acquisition of Horizon Propane” suggests confusion as to the timing of the

⁴² B.R. 3039 - Memorandum of Opinion and Order – p. 8.

⁴³ See Sixth and Seventh Supplemental Submissions in Support of Renewed Motion copies of which are attached hereto as Exhibit K. *Trans Mississippi Corp. v. United States*, 494 F.2d 770, 773 (5th Cir. 1974) (“evidence merely cumulative or impeaching is not generally within the canon of ‘newly discovered evidence’ for Rule 59 or Rule 60(b) purposes”).

events being described in that Horizon Propane was not acquired by Amerigas until October 2003.

All of the events, except Ms. Whitesel's employment by Level, describe events that took place more than a year after the entry of the Agreed Order. Further, nowhere in Ms. Whitesel's statement is there anything connecting the actions described therein to the Bank Group or anyone else purportedly involved in the "scheme" alleged by Appellant.

Mr. Kessler's statement – all seven paragraphs of it – similarly fails to demonstrate any meaningful connection between the alleged events described therein and the Bank Group or anyone else purportedly involved in the alleged scheme or any connection to the entry of the Agreed Order:

- Paragraph 1 simply states his position with Level and alleges that he held that position for all times relevant to his statement. (His statement describes events from the time the Debtors were placed in bankruptcy in June 2002 through October 31, 2003, but doesn't specify his start date or whether he had served in that capacity during heating seasons prior to the commencement of the Debtors' chapter 11 cases.
- Paragraph 2 asserts that Patty Geitgey of Newmarket Partners served as an active manager of Level from the commencement of the bankruptcy to the sale of Level to Horizon Propane, LLC. It does not, however, describe Mr. Kessler's interactions with her, if any; provide any detail as to the managerial acts allegedly taken by Ms. Geitgey; or whether such actions were inconsistent with that of an on-site monitor for the Bank Group as permitted by the terms of the Agreed Order
- Paragraph 3 regarding the sale of Level's propane distribution business to Horizon Propane and the involvement of prominent Cleveland businessman, Richard Jacobs, does nothing more than describe developments in the Debtors' bankruptcy cases that had been subject to Bankruptcy Court approval following notice and a hearing.

Paragraphs 4 through 7 – four sentences from which Appellant has extrapolated his allegations that "millions of dollars in checks from tens of thousands of customers"⁴⁴ were wrongfully diverted from the Debtors' estates commencing the last week of January 2003⁴⁵ – describes events allegedly witnessed from June 27, 2003 through October 31, 2003 more than a year after

44 The Motions – p. 16.

45 The Motions – p. 6.

the entry of the Agreed Order. Nowhere in his statement does Mr. Kessler use state that “millions of dollars in checks from tens of thousands of customers” had been wrongfully diverted. Nothing in this portion of Mr. Kessler’s statement, even if the alleged events were assumed to be true, constitutes evidence that is material to Appellant’s assertion that the Agreed Order entered in June 2002 was obtained through a fraud on the Court.⁴⁶

3. **Appellant has Not Provided a Cogent Explanation as to Why the “Newly Discovered” Evidence – the Statements of Ms. Whitesel and Mr. Kessler – Would Have Changed the Outcome Below, i.e., Resulted in the Entry of an Order Vacating the Agreed Order.**

Appellant must also demonstrate that the newly discovered evidence was “of such a magnitude that the production of it earlier would have been likely to change the disposition of the case.”⁴⁷ This element requires a movant to “present a cogent explanation as to *why*” the evidence would change the outcome.⁴⁸ In this instance, Appellant must demonstrate why the new evidence would have resulted in a different result below, i.e., in an order vacating the Agreed Order.

Appellant has not presented such an explanation. Instead, Appellant merely asserts that “by making the outrages described previously concrete, this evidence is likely to change the outcome of the litigation.”⁴⁹ In denying the Motion to Vacate, the Bankruptcy Court, focusing as appropriate on the events surrounding the entry of the Agreed Order, concluded that Appellant had “failed to offer any evidence showing fraud, duress, or some other fact that is sufficient to

⁴⁶ Appellees note that Mr. Kessler’s statement is lacking in detail necessary to establish its significance – “enormous” is not susceptible to accurate calculation, similarly “previous months activity” could easily mean prior sales instead of withheld customer checks as alleged by Appellant. Consequently, Appellee’s expressly reserve their rights to challenge the admissibility, credibility and materiality of the statements submitted by Ms. Whitesel and Mr. Kessler if the Court concludes that a hearing on Appellant’s Civil Rule 60(b)(2) is warranted.

⁴⁷ *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211-212 (9th Cir. 1987).

⁴⁸ *Resolution Trust Corp. v. Kemp*, 951 F.2d 657, 664 (5th Cir. 1992) (emphasis in original).

⁴⁹ The Motions – p. 19.

void the Agreed Order, he has also failed to allege with any degree of particularity, fraud in the inducement of the [Agreed Order] or any other fact upon which the Agreed Order might be voided.” Nowhere does Appellant provide a cogent explanation of how the statements of Ms. Whitesel or Mr. Kessler – describing events that allegedly occurred long after the entry of the Agreed Order and provide nothing connecting the alleged events described to the Bank Group or others claimed to be involved in the vast conspiracy alleged by Appellant – are remotely connected to the entry of the Agreed Order that was the subject of Appellant’s Motion to Vacate or why such statements would have led the Bankruptcy Court to reach a different conclusion than that reached below. Since Appellant cannot satisfy all of the elements necessary to obtain relief under Civil Rule 60(b)(2), his motion to vacate the Bankruptcy Court order denying the Motion to Vacate the Agreed Order must be denied.

Dated: Cleveland, Ohio
March 30, 2007

Respectfully submitted,

/s/ Michael D. Zaverton
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 2007, the foregoing *Objection to Motion* 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/ Michael D. Zaveron