

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

In Re:)	Case No. 07-CV-0150
)	
LEVEL PROPANE GASES, INC., et. al.)	
)	Bankruptcy Case No. 02-16172
Debtors.)	
_____)	
)	JUDGE ANN ALDRICH
WILLIAM H. MALOOF,)	
)	
Appellant,)	MAGISTRATE JUDGE PERELMAN
)	
)	
vs.)	
)	
LEVEL PROPANE GASES, et. al.)	
)	
Appellees)	

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities p. iii

Statement of the Case p. 1

Introduction. p. 3

Law and Argument p. 3

 (I.) The Bankruptcy Court Abused Its Discretion When It Determined
 that Appellant’s Filings Relating to the Appointment of an Examiner
 Warranted the Imposition of Sanctions Under 28 U.S.C. Sec. 1927. . . . p. 3

 (II.) While a Bankruptcy Court has Inherent Power to Sanction
 Vexatious, Wanton or Oppressive Conduct, It Abuses that Power When
 a Party has Acted Only to Bring Concealed Wrongdoing to the
 Attention of the Court. p. 4

Conclusion p. 5

 Service p. 5

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re: Southern Industrial Banking Corp v. Bucher</i> , 91 B.R. 463 (USBC, ED, Tn, 1988)	3
<i>In re: Nowatzke</i> 318 B.R. 400 (USBC, EDMi, 2004)	3
<i>Chambers v. NASCO, Inc.</i> 501 U.S. 32 (1991)	3
<u>Rules</u>	
R. 59, F. R. Civ. P.	1
R. 60(b)(2), F.R. Civ. P.	1, 2

INTRODUCTION

Appellant will briefly respond to Appellees' arguments, having already set out its arguments in chief in his previously filed brief. To impose sanctions here would be to condone the concealment of the Appellees' wrongdoing. That the concealment of this wrongdoing had been so far successful is no reason to punish its disclosure.

LAW AND ARGUMENT

-I-

THE BANKRUPTCY COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT APPELLANT'S REPETITIVE FILINGS RELATING TO THE APPOINTMENT AN EXAMINER WARRANTED THE IMPOSITION OF SANCTIONS UNDER 28 U.S.C. Sec 1927

The Appellees' argument is grounded on two premises: first, that the Appellant's Motions to with respect to the Examiner's were repetitive in that they sought the same relief, and, second, that none of the evidence presented with the Renewed Motion to Reopen the Examiner's Investigation was newly discovered. If either of these two premises fail, their argument fails with it. In order to maintain its argument that none of its evidence was newly discovered, the Appellees must take the position that none of the evidence supporting the Renewed Motion was newly discovered in time to move for a new trial under R. 59, F. R. Civ. P. As the record below indicates, the Appellees also claimed that the Renewed Motion failed under R. 60(b)(2), an argument that they have apparently abandoned. If untimely under R. 59, F. R. Civ. P., the Renewed Motion clearly asked the Bankruptcy Court to revisit its decision on the basis of new evidence, by any measure a timely motion under R. 60(b)(2), F. R. Civ. P. In order to maintain that premise, the Appellees must argue that the evidence upon which the Appellant relied in support of his Motion he either knew or with reasonable diligence should have known

within the time to move for a new trial, or knew or should have known of the evidence within the time to file a motion under R. (60) (b)(2), F. R. Civ. P.

The Appellees' entire argument depends on the presumption that these matters were ordinary litigations litigated in the ordinary manner. This litigation, however, was anything but ordinary, in that the Appellant was excluded from the very premises at which it was possible to discover the evidence and forbidden to contact the employees of the Debtors who were the very persons of whom he could enquire in order to discover the evidence by an Agreed Order that he was challenging simultaneously on the basis of fraud. Their argument thus presumes that this evidence was available to him at all times and he wantonly failed to take hold of it in a timely fashion.

The Renewed Motion cannot be credibly compared to those pleadings that were subject of sanctions in the cases cited by the Bankruptcy Court in its Opinion. The Renewed Motion sought to bring to the attention of the Bankruptcy Court concealed wrongdoing by officers of the Appellees. This, as discussed previously, is in no way comparable to the bad faith of perjured testimony sanctioned in *In re: Nowatzke* 318 B.R. 400 (USBC, EDMi, 2004), or surreptitious defiance of a court order in *Chambers v. NASCO, Inc.* 501 U.S. 32 (1991), or the patent misstatements of law and fact in *In re: Southern Industrial Banking Corp v. Bucher*, 91 B.R. 463 (USBC, ED, Tn, 1988).

Turning to the evidence submitted with Renewed Motion itself, the emails were discovered closely upon the filing of the Renewed Motion, which was filed only twelve days after the Motion to Reopen was denied. The Renewed Motion, moreover, responded to the reasoning of the Opinion by which the Motion to Reopen was denied, that, stripped to its essentials, the testamentary evidence did not sufficiently specify the documents or

records destroyed or otherwise compromised so that further investigation was required. The Renewed Motion responded to the Court's reasoning by offering new evidence that disclosed discussion of compromise of records in one instance, the Sues-Marwil email exchange, and destruction of documents, the Anter-Brandt email exchange. The submissions that followed sought to amplify the argument by offering newly discovered evidence that those managing the affairs of Level Propane had tampered with customer database, including emails that disclosed the tampering with the customer database (Docket Nos. 2987, 2988). The Appellees simply assert that the Appellant could with reasonable diligence have found these *internal* emails within ten days of the Order. They fail to address how the Appellant could even frame the question as to the customer database, or by what means he could discover this evidence when he had no access to any aspect, physical, communicative, or data, of any of the businesses in the Chapter 11 since June 6, 2002.

The Suzanne Arena Statements (Docket Nos. 2995, 2997) which point-blank stated that the hard copy customer records that were used on a daily basis vanished from the building, that the customer database had been tampered with so that the record of tens of thousands of customer accounts were purged from system and that a phony "tank recovery committee" was formed to provide a pretext by which to restore these purged customer accounts were signed on August 1 and 2, 2006. Ms. Arena stated that she entered the employment of Level Propane after it was in Chapter 11, and that the first time she met the Appellant was July 21, 2006. The Appellees make no attempt to show how the Appellant, barred from any contact with any employee, could failed to have exercised due diligence when he contacted Suzanne Arena a moment before he did so.

The Appellees would require of Appellant that he know of evidence that of which he could not know because he had been barred from the means of discovering it. They would likewise bar the Appellant from presenting to Court additional evidence of which he became aware after he made his initial Motion. The evidence they insist that Appellant ought to have discovered upon the exercise of due diligence was in their control and was evidence of their own wrongdoing. No court exercising its sound discretion could fail to recognize that Appellant's discovery of any of this evidence at all was short of astonishing.

-II-

WHILE A BANKRUPTCY COURT HAS INHERENT POWER TO SANCTION VEXATIOUS, WANTON OR OPPRESSIVE CONDUCT, IT ABUSES THAT POWER WHEN A PARTY HAS ACTED ONLY TO BRING CONCEALED WRONGDOING TO THE ATTENTION OF THE COURT.

It is without doubt that every court has the inherent power to protect the integrity of its processes. A court abuses that power, however, when, as here, it punishes a party for bringing evidence before it of wrongdoing by officers of the court. Here, the filings that are subject of the sanctions all brought evidence of wrongdoing by the Appellees to the Court's attention. The evidence with the Renewed Motion itself was credible, but the evidence of Suzanne Arena was well-nigh conclusive. This evidence was discovered by the Appellant despite the fact that this evidence was in the control of the Appellees, he was barred from contact with any of the Debtors' employees, and the Appellees as a result were able to shield from view the evidence of their own wrongdoing. To sanction the Appellant would be to sanction the very wrongdoing the Appellant had brought to the attention of the Bankruptcy Court.

CONCLUSION

The Appellees in order to make their argument must maintain that Appellant failed to exercise due diligence in discovering the evidence of the Appellees' concealed wrongdoing. They are asking for this Court to rule that a Court acts within its sound discretion when it punishes with sanctions a party who discovers, despite every effort of the wrongdoer, concealed wrongdoing and brings that wrongdoing to light.

Respectfully Submitted,

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SERVICE

I hereby certify that on this 25th day of March, 2007, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/David C. Eisler

David C. Eisler, Counsel for the Appellant